Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware corporation,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner states a claim for a physical taking of its property in violation of the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution based upon the U.S. Fish and Wildlife Service having obtained an injunction pursuant to the Endangered Species Act that prohibited Petitioner from harvesting any timber on a 65 acre parcel of its land in order to preserve it as a Northern Spotted Owl habitat and required Petitioners to allow government agents to enter its property to conduct owl surveys?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are the Petitioner Boise Cascade Corporation and the Respondent United States of America.

CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Boise Cascade Corporation respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit dismissing its physical taking claim based upon (1) the U.S. Fish and Wildlife Service having obtained an injunction which prohibited Petitioner from harvesting any timber on a 65 acre parcel of its land in order to preserve it as a Northern Spotted Owl habitat, and (2) the district court having required Petitioners to allow government agents to enter its property to conduct owl surveys during the pendency of the injunction.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Federal Circuit (No. 01-5106), entered September 3, 2002 denying Petitioner's combined petition for panel rehearing and for rehearing en banc is reproduced as Appendix A. The Federal Circuit's July 19, 2002 published decision and judgment affirming the Court of Federal Claims' dismissal of Petitioner's claim for a physical taking based on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982), is reported at 296 F.3d 1339. The unpublished decision of the Court of Federal Claims (No. 99-CV-860), entered April 10, 2001 granting Respondent's motion to dismiss for failure to state a claim and directing entry of judgment against Petitioner is reproduced as Appendix B. The Judgment of the Court of Federal Claims, also entered on April 10, 2001 dismissing Petitioner's complaint is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The Federal Circuit entered its opinion and judgment dismissing Petitioner's complaint on July 19, 2002, *see* 296 F.3d 1339, and denied Petitioner's request for a rehearing on September 3, 2002. (App. A). This Petition is being timely filed within 90 days of the denial of a timely petition for rehearing, which rendered the judgment final. *See* 28 U.S.C.A. § 2101(c); Supreme Court Rule 13.3; *see also Missouri v. Jenkins*, 495 U.S. 33 (1990) (timely petition for rehearing suspends finality of judgment for purposes of determining timeliness of petition for writ of certiorari). The Court has jurisdiction pursuant to 28 U.S.C.A. § 1254(1).

Petitioner's physical takings claim based on *Loretto* raises the same issue as the pending Petition for Certiorari in *Seiber v. State of Oregon*, U.S. Supreme Court Docket No. 02-348. This Court has requested that the State of Oregon file a response to the Seibers' Petition. *See* Docket entry for Oct

28, 2002 in Case No. 02-348, Response requested (Due November 27, 2002). Attorneys for Petitioner in this case also represent the Seiber Petitioners in Case No. 02-348.

CONSTITUTIONAL PROVISIONS INVOLVED

The Takings or Just Compensation Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Takings Clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

Section 5 of the Endangered Species Act ("ESA"), 16 U.S.C.A. § 1531, *et seq.* authorizes the federal government to acquire private land by eminent domain for the presservation of threatened and endangered species. It provides in part that the Secretary of the Interior "is authorized to acquire by *purchase*, donation, *or otherwise*, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him." 16 U.S.C.A. § 1534(a)(2) (emphasis added).

Section 9 of the ESA prohibits the "take" of listed species. *See* 16 U.S.C.A. § 1538(a)(1). To "take" a species under the ESA "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C.A. § 1532(19). Regulations promulgated by the Environmental Protection Agency provide that

> Harm in the definition of "take" in the [ESA] means an act which actually kills or injures wildlife. Such act

> may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

The U.S. Fish and Wildlife Service ("FWS") is authorized to issue an Incidental Take Permit ("ITP") for threatened species under Section 10 of the ESA, 16 U.S.C.A. § 1539(a), which provides in part:

> (a) Permits
>
> (1) The Secretary may permit, under such terms and conditions as he shall prescribe—
>
> .....
>
> (B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.
>
> (2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—
>
> (i) the impact which will likely result from such taking;
>
> (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
>
> (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
>
> (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

The enforcement provisions in Section 11 of the ESA provide in part that "[t]he Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof." 16 U.S.C.A. § 1540(e)(6).

STATEMENT OF THE CASE

A. Facts Material to the Question Presented.

The Petitioner is the owner of 65 acres of commercial timberlands in Clatsop County, Oregon, 56 acres of which contain large old growth conifer trees that is the preferred

habitat of the Northern Spotted Owl. The spotted owl was listed as a threatened species by the FWS in 1990. Shortly thereafter, the Oregon Department of Forestry ("ODF") adopted an administrative rule based upon a FWS guideline that prohibited harvesting timber within a 70-acre area surrounding a spotted owl nest site. In 1990, a nesting site was identified in the timber, which was occupied by a breeding pair of spotted owls until 1996.

During the 1997 nesting season the ODF found that the female owl had died and the male owl had left the Timber to nest with a new mate approximately 8 miles away. In August 1997, the ODF notified Petitioner that the nest site on its land had been declared abandoned and it was therefore free under Oregon law to harvest the timber. The ODF, however, advised Petitioner to check with the FWS before commencing to harvest the timber to make sure that Petitioner would not be in violation of the ESA. Petitioner, through its counsel, wrote to the FWS indicating that the ODF had declared the nest site to have been abandoned and requesting whether the FWS had any objection to Petitioner harvesting the timber. *See* Letter from Phillip D. Chadsey to Russell Peterson, Regional Director, FWS (October 20, 1997), reproduced as Appendix D. In reply, the Office of the Solicitor of the Department of the Interior advised Petitioner that it believed a "take" risk still existed because other owls might decide to nest there, and suggested that Petitioner apply for an ITP under Section 10 of the ESA. *See* Letter from Steven Siegel, Attorney, U.S. Department of the Interior to Phillip D. Chadsey (October 30, 1997), reproduced as Appendix E.

Since the ODF had found that the spotted owls were no longer using the timber and the ESA does not require a landowner to obtain an ITP before harvesting timber, Petitioner brought an action in the U.S. District Court for the District of Oregon seeking a declaration that the site had been abandoned. *See* Complaint in ***Boise Cascade Corporation v.***

Michael J. Spear, Regional Director for U.S. Fish & Wildlife Service, U.S.D.C. Or. Case No. 97-1810 JO (Jan. 22, 1998) ("*Boise Cascade 1998*"), reproduced as Appendix F. The FWS filed a counterclaim alleging that it considered the nest site to still be occupied and seeking to enjoin Petitioner from harvesting the Timber unless it obtained an ITP for the owls. *See* Federal Defendants' Answer to Plaintiff's Counterclaim in *Boise Cascade 1998*, reproduced as Appendix G. The district court initially granted the FWS a preliminary injunction to cover the 1998 nesting season. In addition, Petitioner was required to allow the FWS to go onto its property to search for spotted owls. *See* Letter from the Honorable Robert E. Jones to counsel in *Boise Cascade 1998* (May 1, 1998), reproduced as Appendix H. On October 15, 1998 the district court entered a "Decree and Judgment" granting the FWS a permanent injunction barring Petitioner from harvesting any timber on its land unless it obtained an ITP. The court also dismissed Petitioner's claim for declaratory relief and for an injunction against the FWS. *See* Decree and Judgment in *Boise Cascade 1998* (entered October 15, 1998), reproduced as Appendix I.

Petitioner then prepared a Habitat Conservation Plan ("HCP"), and submitted it to the FWS along with an application for an ITP for any spotted owls in its timber. In the HCP, Petitioner agreed to comply with all Oregon wildlife conservation laws, if the FWS approved the ITP. According to the FWS Habitat Conservation Planning Handbook, it should take less than three months to process a "low-effect HCP," *i.e.*, one that involves "relatively few acres of habitat" and where the impact on a list species is "minor or negligible." *See* U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook (1996) at 1-9 and 1-14 (37a-38a), excerpts reproduced as Appendix J. According to the FWS, 7.5 million acres of federal forestlands were already being protected as primary habitat for the spotted owl, which is less than half of

the available habitat on federal forestlands. *See* U.S. Department of the Interior, *Recovery Plan for Northern Spotted Owl—DRAFT* (April 1992) at ix (42a-43a), excerpts reproduced as Appendix K. No private lands were designated by the FWS as a "critical habitat" for the spotted owl pursuant to 16 U.S.C.A. § 1533(a)-(b).

The first step in processing an ITP application requires the government to publish notification in the Federal Register in order to give the public 30 days in which to comment on the HCP. 16 U.S.C.A. § 1539(c); (*See also* App. J at 1-7; 37a.). When the FWS failed to publish notice after Petitioner requested it do so in a timely manner, Petitioner brought a mandamus action seeking a writ to require the FWS to act on its ITP application. *See* Complaint in *Boise Cascade Corporation v. Russell D. Peterson, State Supervisor for U.S. Fish & Wildlife Service*, U.S.D.C. Or. Case No. 98-1538-JO (Dec. 10, 1998), reproduced as Appendix L. At a hearing on February 5, 1999, the district court ordered the FWS to act on the permit application by September 1999. 296 F.3d at 1342. In May 1999 a juvenile owl that had been living in the area was found dead. *Id.* Then on July 30, 1999 the FWS sent Petitioner a letter stating:

> Based on our review of all the information concerning this site over the last three years and the new survey results, the best scientific information currently available indicates that no spotted owls would be taken by Boise Cascade's planned harvest of the property. Therefore, an Endangered Species Act incidental take permit is no longer required.

On August 17, 1999 the district court lifted the injunction. *See id.*

On October 6, 1999 Petitioner filed this action in the Court of Federal Claims seeking compensation for a "temporary taking of merchantable timber, which it was prevented from logging" due to the injunction of the district court. 296 F.3d

at 1342. One of the theories that Petitioner advanced was that there had been a *per se* physical taking of its land because (1) the injunction required it to submit to a government-authorized physical occupation of its timber and prohibited Petitioner from taking any action to exclude the owls from its property, including any logging, and (2) Petitioner was required by the district court to permit government agents to enter its land and conduct owl surveys for several months as part of the injunction. *Id.* at 1342-43.

The government moved to dismiss Petitioner's complaint, and specifically the *Loretto* claim, on the ground that there had been no forced government occupation resulting in a physical taking. *Id.* at 1343. Petitioner cross-moved for summary judgment on its takings claims. On April 10, 2001, the Court of Federal Claims granted the government's motion, denied Petitioner's cross-motion, and entered judgment in favor of the United States. (Apps. B-C.)

Petitioner then appealed to the Federal Circuit, which affirmed, entering its decision and judgment on July 19, 2002, *see* 296 F.3d 1339, and denied Petitioner's combined petition for panel rehearing and for rehearing en banc on September 3, 2002. (App. A.)

REASONS FOR GRANTING THE PETITION

The decision below was rendered by the United States Court of Appeals for the Federal Circuit. *See* 296 F.3d at 1342. Grounds for review exist where a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Supreme Court Rule 10(c). Grounds for review also exist where a United States court of appeals has entered a decision in conflict with the decisions of other federal courts of appeals and state

courts of last resort on the same important federal issue. Supreme Court Rule 10(a). All of the above grounds for review are present here.

A. This Case Involves an Important Constitutional Question That Should Be Resolved by This Court.

The Federal Circuit's decision is part of a growing number of cases arising out of state and federal laws and regulations that require property owners to leave their land in its natural condition so it can be occupied as wildlife habitat and, at the same time, deny the property owner compensation for the imposition of a wildlife servitude. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (involving navigational servitude). These are the same type of wildlife servitudes that the federal government regularly acquires by eminent domain. *See North Dakota v. United States*, 460 U.S. 300 (1983).

Here, the federal government specifically chose not to acquire any interest in Petitioner's property through eminent domain, even though it is was authorized to do so by Section 5 of the ESA. 16 U.S.C.A. § 1534. Instead, the FWS imposed a servitude upon Petitioner's timberland by obtaining an injunction against Petitioner in district court which prohibited Petitioner from logging any part of the 65 acre parcel at issue in order to preserve it as a wildlife refuge for spotted owls. In addition, at the request of the FWS the district court authorized a physical incursion when it compelled Petitioner as part of the injunction to provide government surveyors with access to its land to search for owls. The government should not be allowed to avoid paying just compensation for physical takings merely because it chooses to use the court system to appropriate those property rights, rather than exercising its power of eminent domain.

1. *Under a Physical Taking Theory the Test Is Whether the Landowner Has the Right to Exclude Wildlife, Not Whether the State Has Control Over It.*

a. A Physical Taking Is at Issue Here.

There is a bright-line test that distinguishes the applicability of a physical taking analysis from that of a regulatory taking. As this Court recently explained in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), a two-pronged inquiry determines whether a physical taking is at issue: (1) does the government claim "any right to use the property" for its own purposes, and (2) does it affect the landowner's right to exclude others? *Id.* at 1479 n.19. If the answer to both of these questions is "yes," then the case must be analyzed as a physical taking. *Id.* By contrast, a "regulatory taking" does not give the government "any right to use the property, nor does it dispossess the owner or affect her right to exclude others." *Id.*

A physical taking analysis applies in this case. In obtaining the permanent injunction against Petitioner (*see* App. I), the FWS both claimed the right to use Petitioner's property for a spotted owl nesting habitat, and prevented Petitioner from engaging in any action to exclude the owls from its property, because to do so would have required "taking" them within the meaning of the injunction and the ESA. (*Id.*); 16 U.S.C.A. §§ 1532(19), 1538(a)(1); 50 C.F.R. § 17.3.

b. The Government's Ability to Control Wildlife Is Not Relevant.

In dismissing Petitioner's physical taking claim, the Federal Circuit relied upon a 1999 opinion by the Oregon Court of Appeals involving the same issue, which held that the landowner could not state a claim for a physical taking because "[t]he state has no control over where spotted owls

choose to nest." *Boise Cascade Corp. v. State ex rel. Oregon State Bd. of Forestry*, 991 P.2d 563, 570 (Or. Ct. App. 1999), *review denied*, 18 P.3d 1099 (Or. 2000), *cert. denied*, 532 U.S. 923 (2001) ("*Boise Cascade 1999*"). *See also* 296 F.3d at 1354-55 (adopting the *Boise Cascade 1999* reasoning). The Oregon state court in *Boise Cascade 1999* improperly shifted the focus of this Court's physical taking jurisprudence from the issue of whether there has been a forced, government-authorized occupation to whether government has control over the occupant, which this Court has never deemed to be the determining factor. *Loretto*, 458 U.S. at 432 n.9; *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992).

In a physical taking case, the key issue is whether the government has *authorized* the *occupation* of private land by a third-party, and has *denied* the landowner the *right to exclude* the government-authorized occupant. *Yee*, 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176; *Loretto*, 458 U.S. at 432 n.9 ("physical occupation authorized by state law is a taking without regard to whether the State, or instead *a party authorized by the State*, is the occupant") (emphasis added). The test is not whether the government controls wildlife. Government had no control over the occupants in either *Kaiser Aetna* or *Loretto*. In *Kaiser Aetna*, the occupants were the boating public, while in *Loretto* the occupant was an inanimate object that was controlled by a third party. The test is whether government has *required* the landowner to *acquiesce* to an occupation of its property for a public purpose. As this Court explained in *Yee*:

> The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation." . . . Thus whether the government floods a landowner's property, [*Pumpelly*], *or does no more than require the landowner to suffer the installation of a cable*, [*Loretto*],

> the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.

503 U.S. at 527 (citations omitted; first emphasis in original; second emphasis added).

2. *Numerous Courts Have Refused to Compensate Landowners for the Imposition of a Wildlife Servitude.*

Due to the ESA and state regulations that impose similar wildlife servitudes, there are a growing number of cases arising out of government requiring private landowners to subordinate the use of their property to a dominant use of it by the government to protect wildlife. In addition to the Federal Circuit and Oregon state and federal courts, numerous courts in other jurisdictions have also refused to find a taking and award compensation. *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988) (government does not "control the conduct" of wildlife species) *cert. denied*, 490 U.S. 1114 (1989) (*see* dissenting opinion of Justice White); *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. Dist. Ct. App.) (landowner can use its property "in any way that would not disturb the eagles' natural habitat"),[1] *review denied*, 645 So. 2d 452 (Fla. 1994). Relying in part on *Christy*, in *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal. Rptr. 2d 338, 345 (Cal. Ct. App. 1993), a California Court of Appeal rejected a physical takings claim involving the spotted owl and other wildlife species whose habitat was protected by state law. Although the California Supreme Court affirmed the lower court, 876 P.2d 505 (Cal. 1994), it omitted any discussion of

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[1] *See* William K. Jones, Charles Evans Hughes Professor of Law at Columbia University, criticism of the *Flotilla* decision, describing it as a "classic" example of a physical taking. *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 61-62 (1995).

the takings issue and took the extraordinary step of directing that the lower court's opinion not be published in the official reports. 26 Cal. Rptr. 2d 338, n.*; No. S037820, 1994 Cal. LEXIS 1388 (Cal. Mar. 18, 1994). The court apparently wished to avoid issuing a written opinion addressing a physical taking claim where the protection of a wildlife habitat was at issue.

3. *Courts Are Refusing to Apply the Physical Taking Analysis to Government-Authorized Occupations by Wildlife.*

Like several courts that have addressed this issue, the Federal Circuit incorrectly applied a regulatory taking rather than a physical taking analysis. This Court should grant review and clarify which branch of its takings jurisprudence applies when a landowner is forced to acquiesce to a government-authorized occupation of its land by wildlife and prevented from engaging in any activities to exclude such wildlife.

The Federal Circuit characterizes the injunction as constituting nothing more than a temporary "restriction on private use" of Petitioner's land:

> The ESA itself precludes Boise from harassing, harming, pursuing, wounding, or killing spotted owls, 16 U.S.C. §§ 1532(19), 1538(a)(1) (2000). Boise lost whatever right it had to "exclude" the owls nesting on its land when they were listed as a threatened species under the ESA. The injunction, therefore, did not take whatever remained of this putative property interest; it merely prevented Boise from logging its land without a permit, which—as a regulation imposed upon Boise's use of the property—is a restriction on private use of the land and not a per se taking by the government.

296 F.3d at 1354.

This error is typical of courts that deny compensation for the imposition of a wildlife servitude. The Federal Circuit's application of a regulatory taking standard flows from an erroneous assumption that government authorization of the physical occupation by wildlife is irrelevant. It is grounded upon a supposition contrary to fact—that neither the government, nor any government-authorized third-party, is occupying the land.

The permanent injunction obtained by the FWS went beyond merely regulating the use of Petitioner's land; it required that the timber on it be left standing for the sole purpose of providing a spotted owl habitat. Furthermore, the injunction required Petitioner to give federal agents unfettered access to its land to search for owls. Petitioner was prohibited from excluding any owls and from excluding federal agents looking for owls. The injunction clearly required Petitioner to acquiesce to the use of its private property for a public purpose. *Yee*, 503 U.S. at 522-23, 527.

In *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 94 (2d Cir. 1992), the Second Circuit held that there had been no taking because the landowner could exclude from its property deer that the state sought to protect and also could log "the entire 44 acres of critical softwood in the deeryard." By contrast, Petitioner was prevented by the injunction from harvesting its timber or otherwise excluding any owls from its property. Nor did Petitioner have the option of excluding government surveyors. The sum and substance of the FWS's permanent injunction exerted as much control over Petitioner's property as if the government had acquired a formal easement. *Cf. North Dakota*, 460 U.S. 300 (waterfowl nesting site easements purchased by the federal government under the Migratory Bird Conservation Act, 16 U.S.C.A. § 715, *et seq.*).

In addition, unlike regulatory takings cases, there was no potential "'reciprocity of advantage'" in this case, since Peti-

tioner gained nothing from the restriction on its right to harvest the subject timber, while other owners in the area were free to harvest theirs. *Tahoe-Sierra*, 122 S. Ct. at 1479 n. 19 (citation omitted). Petitioner paid taxes on its land while it was simultaneously prevented from logging and barred from deriving any income from the timber crop. The injunction singled Petitioner out to bear a burden that was not imposed upon many of its neighbors who own commercial timberlands. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Tahoe-Sierra*, 122 S. Ct. at 1488-89. Spotted owls require mature or old-growth timber for nesting sites. (*See* App. K at 19; 49a-51a.) Many of Petitioner's neighbors, including the federal government, have harvested much, if not all of their mature timber in the area, and are now harvesting replacement crops of trees before they reach maturity in order to avoid having them become spotted owl habitat.[2] As one scholar has pointed out, "only latecomers bear the cost of protecting listed species, even though, from a broader perspective, it is the early developers who brought the species to near extinction in the first place." Bradley C. Karkkainen, *Biodiversity and Land*, 83 Cornell L. Rev. 1, 93 (1997). Professor Karkkainen goes on to state: "The costs are heavily concentrated on a relatively small number of individuals that compose a distinct subgroup of a much larger beneficiary class." *Id.* at 95.

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[2] The federal government owns 31,358,000 acres of land in the State of Oregon, or 50% of the total acreage. Atlas of Oregon, page 84 (University of Oregon, 2d ed. 2001). The United States Forest Service manages 15,643,000 acres (25%) of timberlands and the Bureau of Land Management ("BLM") manages another 15,715,000 acres (25%) of timber and non-timber land in Oregon. *Id.* Under the Department of Interior's Recovery Plan, the FWS ended up protecting as critical habitat on federal lands 7.5 million acres, or a little less than half (48%) of the total acreage available as spotted owl roosting and foraging habitat on federal lands. (App. K at ix; 42a-43a.) The FWS did not designate any private lands as critical habitat for the owls. (*Id.* at 4; 45a-47a.)

As another scholar explained: "Unlike zoning regulations that spread the burdens and benefits so as to create an average reciprocity of advantage, the ESA burdens only a few landowners who unfortunately provide a habitat for a protected species." Stephen P. Foley, Comment, *Does Preventing "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. Envtl. L. & Pol'y 327, 344 (1995-96).

4. *Failure to Provide Just Compensation Is Creating Perverse Incentives Contrary to the Interests of Wildlife and the Public.*

By failing to provide compensation to those owners who do have spotted owl nesting habitat, government is encouraging other owners of private timberlands to manage their timber so that trees are harvested earlier, before they can become a suitable spotted owl nesting habitat. *See* Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 45 (1993-94). Otherwise, as in this case, an occupation by owls will render their timber without any commercial value. The government's short-sighted policy serves neither the best interests of the owls, nor those of landowners whose timber is appropriated for owl habitat.

Nor is this issue limited to the Northern Spotted Owl. It is common knowledge today that the owner of a potential ESA wildlife habitat has every incentive to harvest or otherwise develop the land as quickly as possible before an invading animal is authorized by government to occupy the land for as long as it likes, and any actual or planned commercial use of the property is brought to a screeching halt. If private landowners knew they would be compensated by the public when private land is used for such a public purpose, the incentive to use the saw-blade or bulldozer as soon as possible could be abated, to everyone's best interests.

In another case involving spotted owls and the ESA, where the definition of "taking" rather than property rights was at issue, Justice Scalia prophetically wrote: "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting). To protect themselves from the unfairness of the present judicial reluctance to provide compensation for wildlife servitudes, landowners will conduct their operations as rational economic actors in a manner that may threaten the very purpose of the ESA itself—to preserve endangered species and their habitats. Eliminating both the unfairness of refusing just compensation and the incentive to develop and harvest sooner rather than later is not only the right thing to do; it is consistent with a logical development of this Court's takings jurisprudence to give full effect to the intent and purpose of environmental protection legislation. As Justice Holmes admonished in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922): "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

B. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal and State Courts.

1. *The Federal Circuit's Decision Is Contrary to This Court's Physical Taking Jurisprudence*

The Federal Circuit's refusal in this case to apply a physical taking analysis was contrary to the basic takings jurisprudence of this Court as established in *Tahoe-Sierra*,

Loretto, *Yee*, and *Kaiser Aetna*.[3] The test is not government control over wildlife, but whether government has required acquiescence to the occupation of private land for a public purpose. *Yee*, 503 US at 527.

Petitioner had no choice but to permit spotted owls to nest on its property while the injunction was in effect. It had no choice but to permit FWS agents to search its property for owls. Furthermore, the injunction expressly prohibited Petitioner from conducting any activities on its land that might "take" the owls within the meaning of the ESA, including habitat modification through logging. A *de facto* easement was imposed by the government through the injunction which imposed a servitude upon the subject timberland to provide a wildlife habitat for spotted owls. This was clearly a physical taking.

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[3] The Federal Circuit's holding that only *permanent* physical occupations are compensable, was also inconsistent with this Court's precedents. As explained in *Tahoe-Sierra*:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, *even though that use is temporary*. *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945), *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946).

122 S. Ct. at 1478-79 (emphasis added). *See also First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (forced temporary occupation by floodwater); *U.S. v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (temporary incursions by military planes of air space over private land).

2. *Lower Federal and State Courts Are Split on This Important Federal Issue.*

There is a split among the lower courts in cases involving wildlife over whether a property owner can sustain a claim based on a physical taking theory. The better-reasoned cases focus on whether the property owners have the right to exclude protected wildlife from their land. If not, the forced occupation imposes a wildlife servitude. *Southview Assocs.*, 980 F.2d 84; *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942) ("If the Government wishes to do more in the way of protecting migratory birds than prohibiting their slaughter, . . . it must acquire some proprietary interest in the areas suitable for such uses."); *State v. Herwig*, 117 N.W.2d 335, 340 (Wis. 1962) (holding that in order to protect bird nesting habitat on private land "the state should acquire whatever rights or easements are needed by purchase, lease or condemnation"); *Shellnut v. Ark. State Game & Fish Comm'n*, 258 S.W.2d 570, 574 (Ark. 1953) (taking of private property for a wildlife refuge); *Moerman v. State*, 21 Cal. Rptr. 2d 329, 333-34 (Cal. Ct. App. 1993) (holding that there was no taking under *Loretto* because the landowner had the right to exclude elk from his property).[4]

These cases conflict with the Federal Circuit's decision and many others, such as *Boise Cascade 1999*, which avoid an exclusion analysis and hold that there can be no physical taking based upon having to submit to an occupation by wildlife, because government has no control over wildlife.

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[4] The decision of the United States Court of Federal Claims in this case is also inconsistent with its holding in another case that the federal government was liable for a physical taking under the ESA for private water rights appropriated to protect endangered fish species. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318-19 (2001).

See e.g., Christy, 857 F.2d 1324; *Fla. Game & Fresh Water Fish Comm'n*, 636 So.2d 761; *Sierra Club*, 26 Cal. Rptr. 2d 338.

3. *The Protection of Public Funds Motivates the Trend Toward Erroneous Application of a Regulatory Taking Analysis.*

This Court recently explained that a physical taking is "typically obvious and undisputed" and should be "easily identified." *Tahoe-Sierra*, 122 S. Ct. at 1478 n.17, 1479. While physical appropriations of private property for a public purpose may be obvious to landowners, as the foregoing cases indicate, they are not always easily identified by the lower courts and all too often they are disputed by the government through a long and expensive litigation process. *Id.* at 1478 n.17; *e.g. Tulare Lake*, 49 Fed. Cl. at 318; *Boise Cascade 1999*, 991 P.2d at 570; *see also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (1990), *aff'd*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687, 698 (1999) (which, although tried as a regulatory taking claim, in part involved habitat for the endangered Smith's Blue Butterfly). By arguing that such cases should be analyzed as a regulatory taking rather than as a physical taking, government stands a much better chance of avoiding liability for having made use of a landowner's property for a public purpose.

The government's argument for a regulatory taking analysis is that its need to protect threatened or endangered wildlife habitat trumps almost any limitation imposed on the owner's productive use of the property.[5] *Tulare Lake*, 49

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[5] "FWS personnel recognize that property owners will have difficulty getting to court prior to exhausting the HCP process and assume that the government will withstand takings challenges if it permits a landowner at least some use of his property." Barton H. Thompson Jr., *The Endangered Species Act: A Case Study In Takings & Incentives*, 49 Stan. L. Rev. 305, 336 (1997).

Fed. Cl. at 318-19. From the government's standpoint, the property owner's investment-backed expectations, compared to the need to protect endangered or threatened wildlife, are irrelevant. To many in government, such wildlife, like historic sites, must be protected at all costs; however, because those costs may be more than most taxpayers are willing to bear, it is often the government's position, supported by some in the academic community, that they should be borne by the landowner and not the public.[6] *Id.*; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138-42 (1978) (Rehnquist, J., dissenting).

Courts are well aware of the impact that takings cases can have on the public treasury and have not been hesitant to seek ways to avoid this Court's takings jurisprudence. *See* Justices Scalia and O'Connor dissenting from a denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994); *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994).

There can be no dispute that the FWS's injunction authorized the owls' occupation of Petitioner's land, authorized federal agents to enter Petitioner's land to search for spotted owls, prohibited Petitioner from excluding the owls or the

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[6] In support of this view, a number of academics argue that this Court has taken an anachronistic approach to takings cases involving natural habitat, based upon an archaic view of property rights that must change in order to save the environment. James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735, 737 (1993) ("The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it."); *see also* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311 (1988); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433, 1445 (1993); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 105-06 (1995).

federal agents, and prohibited Petitioner from harvesting its timber and deriving any commercial value from the land. The facts of this case thus fall squarely within the definition of a physical taking. *Tahoe-Sierra*, 122 S. Ct. at 1478-79.

CONCLUSION

Petitioner respectfully urges the Court to grant its Petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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November 27, 2002

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed Sept. 3, 2002]

01-5106

BOISE CASCADE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 10, 2002.

FOR THE COURT

/s/ Jan Horbaly
Clerk

Dated: September 3, 2002

APPENDIX B

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed April 10, 2001]

No. 99-860 L

BOISE CASCADE CORPORATION,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

OPINION

WIESE, *Judge.*

Boise Cascade Corporation (Boise), is the owner of a 65-acre tract of timberland located in Clatsop County, Oregon, known as the Walker Creek Unit. Boise brings this action to recover just compensation under the Fifth Amendment of the United States Constitution for what it alleges was a temporary taking of its property. The claim is grounded on the contention that, because of regulatory action taken by the United States Fish and Wildlife Service (USFWS), it was prevented from logging the property for a period of over eighteen months, and thus was deprived of all productive use of its merchantable timber for that period.

The case is before us now on defendant's motion to dismiss for failure to state a claim upon which relief can be granted and plaintiff's opposition thereto. The matter has been fully briefed and argument was heard on April 3, 2001. We now decide the case in defendant's favor.

FACTS

Background

In a letter dated October 15, 1997, the Oregon Department of Forestry advised Boise that it was removing the restrictions on logging in the Walker Creek Unit that the state had imposed several years earlier to protect what was identified then as the habitat of a threatened wildlife species—the northern spotted owl. The letter explained that because the latest survey of the area had failed either to confirm the presence of a nesting pair of adult spotted owls or to provide evidence of an activity center for a pair of adult spotted owls, the unit "no longer fits the criteria for being designated as a northern spotted owl nesting site" under the standards set forth in the state's administrative rules.

The letter went on to caution, however, that while the unit no longer qualified as a spotted owl nesting site under the Oregon Forest Practices Act, the Department of Forestry was not certain how the unit would be regarded by the U.S. Fish and Wildlife Service under the federal Endangered Species Act.[1] The letter further explained: "Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. You may wish to consult with Fish and Wildlife Service officials before deciding any further course of action at the Walker Creek location."

Mindful of the caution expressed in the Department's letter, Boise decided to invite representatives of the USFWS to visit the Walker Creek Unit to assess whether the unit still

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[1] The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994) was enacted by Congress to provide a program for the conservation of endangered and threatened species and for the conservation of the ecosystems on which such species depend. The Act makes it unlawful to "take" any species of wildlife that is listed as endangered or threatened. 16 U.S.C. § 1538(a)(1)(B).

qualified as protectable habitat for the spotted owl. The conclusion was that it did. Boise was informed of the USFWS survey results in a letter of December 10, 1997, from the Department of the Interior regional solicitor's office:

> Survey protocols peer reviewed by federal and state agencies, as well as scientists, biologists, and managers of private timber companies, recommend documenting that a site is vacant for three years before it is considered unoccupied. The removal of nesting habitat at the Walker Creek site, and the prey base associated with this high quality habitat, would create a risk of harm to the spotted owls which would use this site. The Service recommends that the site continue to be monitored consistent with the protocols if Boise wants to be sure it is unoccupied.

The letter went on to say:

> As indicated to you in previous correspondence, if your client desires certainty in this matter, it is welcome to pursue an HCP [Habitat Conservation Plan] and an incidental take permit under the ESA . . . . Another option might be to pursue a land exchange with the State of Oregon, which we believe may be the best alternative for all involved parties.

Boise decided against pursuing either of the alternatives that the USFWS had proposed.[2] Instead, on December 19, 1997, it filed an action for injunctive and declaratory relief in the United States District Court for the District of Oregon, *Boise Cascade Corp. v. Spear*, No. CV97-1810, asking that

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[2] The permit that is referenced in the quoted text ("incidental take permit") is issued under § 10(a)(1)(B) of the Act. That section authorizes the Secretary to grant a permit for any taking otherwise prohibited by § 9(a)(1)(B) "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). A "habitat conservation plan" is required as part of the permit application process. 50 C.F.R. § 17.22(b)(1) (1999).

court to: (i) declare that "logging of its merchantable timber on its Walker Creek Unit, while no northern spotted owls are actually present or known to be present in the area, would not constitute a 'take' of that specie within the meaning of . . . the ESA [Endangered Species Act]" and (ii) enjoin the USFWS "from taking any action to prevent plaintiff from logging its Walker Creek Unit."

The suit did not succeed. Instead, based on the evidence presented, the court granted the motion of the USFWS (defendant in the action) for a preliminary injunction restraining Boise from conducting any logging operations on the Walker Creek Unit pending the results of a further survey of the property. The basis for the court's ruling was its finding that "irreparable harm is imminent and that a taking of spotted owls in violation of the ESA is likely to occur." *Boise Cascade Corp. v. Spear*, No. CV 97-1810 (D. Or. April 1, 1998) (opinion and order granting preliminary injunction at 17).

The contemplated survey was undertaken and its results were reported to the district court in a status conference convened on September 15, 1998. On October 15, 1998, the court issued a decree and judgment stating that "[o]n the basis of all evidence submitted by the parties, and arguments of counsel, this Court hereby finds and concludes that defendant is entitled to a permanent injunction in this matter." *Boise Cascade Corp. v. Spear*, No. CV 97-1810 (D. Or. Oct. 15, 1998) (decree and judgment at 1). Accordingly, it was ordered that Boise Cascade be "permanently enjoined and restrained from taking any northern spotted owls by the logging of any further timber in its Walker Creek Unit without a permit issued pursuant to Section 10 of the ESA." *Id.* at 2.

A month later, in November 1998, Boise filed an application with the USFWS seeking the issuance of a permit to harvest the timber on the Walker Creek Unit. Accom-

panying the permit application was a habitat conservation plan—a required part of the application—in which Boise explained that the tract was last used as a northern spotted owl nesting site in 1996 and that there were no owls now nesting there that could incidently be taken if the timber were logged prior to March 1, 1999 (the beginning of the next nesting season). The plan acknowledged that the harvesting of the timber could result in an incidental take (resulting from habitat modification) of any owls that might use the property as a nesting site in the future. However, the affected acreage—it was further pointed out—was part of a larger core area that itself was probably insufficient to support the needs of a nesting pair of owls. Accordingly, from Boise's point of view, harvesting of the timber "may not appreciably reduce the likelihood of survival and recovery of the species [the northern spotted owl] in the wild." As required by statute, notice of Boise's application was published in the Federal Register on December 23, 1998; the public was invited to comment.[3]

On February 5, 1999, the matter again came before the district court, this time on plaintiff's application (filed December 10, 1998) for an order directing USFWS's expedited consideration of the logging permit. At the conclusion of the hearing, the court issued a bench ruling allowing the agency until September 1, 1999, in which to complete the permit-evaluation process. After that date—the court explained—it intended to vacate the injunction and permit logging to proceed or, alternatively, direct the payment of compensation.

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[3] Section 10(c) of the Endangered Species Act, 16 U.S.C. § 1539(c) directs the Secretary to "publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application."

On July 30, 1999, Boise was advised of the agency's final determination: "based upon . . . review of all of the information concerning the Walker Creek site over the last three years and the new survey results, the best scientific information currently available indicates that no spotted owls would be taken by Boise Cascade's planned harvest of the property." Accordingly, the agency concluded, "an incidental take permit under the Endangered Species Act is no longer required."

Plaintiff's Complaint

On October 6, 1999, plaintiff filed a complaint in this court seeking compensation for the temporary taking of its property. The focus of the complaint is the injunction that was issued by the district court enjoining plaintiff from logging its property without first obtaining a permit under the ESA. That injunction, plaintiff contends, "imposed a condition at the request of the USFWS that the ESA did not require."

In keeping with this view of the matter, plaintiff has filed a four-count complaint alleging as follows: (i) a physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 488 U.S. 419 (1982) (based on the contention that it was denied the right to exclude the northern spotted owl from its property and, additionally, was required to permit government personnel to enter upon its property); (ii) a categorical taking under *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992) (based on the contention that it was prevented from logging its property for a period of over eighteen months and thus was deprived of all economically viable use of its property during that time); (iii) an exaction-type taking under *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (based on the contention that the injunction did not substantially advance a legitimate governmental interest under the ESA) and, (iv) a regulatory taking under *Penn Central Transport Co. v. New York City*,

438 U.S. 104 (1978) (based on the contention that it had a reasonable investment-backed expectation that it would be able to log its property without delay).

Defendant's Motion to Dismiss

Defendant has moved for dismissal of the suit for failure to state a claim upon which relief can be granted. The thrust of the motion is that the district court's injunction did no more than prohibit plaintiff from logging without a permit and therefore placed no constraints upon plaintiff's use of its property sufficient to qualify as a taking of that property under any of the alternative theories of Fifth Amendment liability that plaintiff has alleged. Additionally, defendant urges dismissal of Count One of the complaint (the claim of a per se taking based upon an alleged physical invasion) on the further ground that there was no forced governmental intrusion of plaintiff's property; hence, no taking. Plaintiff opposes defendant's motion.[4]

DISCUSSION

It is a settled principle in takings law that a regulatory process that requires a property owner to obtain a permit before proceeding with a particular use of his or her property does not, in itself, effect a taking of the property. As the Supreme Court has explained: "the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. . . . Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *United States v. Riverside*

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[4] In addition to opposing defendant's motion, plaintiff also filed a cross-motion for summary judgment with respect to each of the counts in its complaint. By separate order, this court denied plaintiff's cross-motion for summary judgment (without prejudice to a right of later reinstatement) pending disposition of the threshold legal issues raised in defendant's motion.

Bayview Homes, Inc., 474 U.S. 121, 127 (1985). Defendant's motion to dismiss rests on this principle.

Plaintiff does not challenge the correctness of this principle as a statement of law. It maintains, however, that defendant's reliance is misplaced. Plaintiff points out that the permit process that was considered in *Riverside Bayview Homes, supra*—requiring a land owner to obtain a permit before placing fill material on property over which the Corps of Engineers had asserted regulatory jurisdiction (a wetland)—was part of a mandatory administrative process. Adherence to that process was a condition necessary to obtaining the authority to proceed. Here, by contrast, we are told there is no existing regulatory regime—no mandatory permit process under the ESA. Rather, Boise contends that under the Endangered Species Act a landowner need not obtain a permit before proceeding with the logging of its timberland. To be sure, it concedes, if in the process of logging without a permit a landowner causes the "take" of an endangered species to occur, then civil and criminal penalties could be imposed. But the possibility that such sanctions might be imposed, argues plaintiff, cannot diminish the fact that it need not have obtained a permit in the first instance. Accordingly, it sees the imposition of a permit requirement in this case as an enlargement of the statutory scheme and, simultaneously, as the imposition of a servitude on its property. And because that servitude remained in place for approximately eighteen months, plaintiff claims that there was a temporary taking of its property for which compensation is now owing.

We cannot endorse this argument; it is wrong as a matter of law. The Endangered Species Act makes it unlawful to take any species of fish or wildlife that has been listed as endangered or threatened. 16 U.S.C. § 1538(a)(1)(B). The Act defines the term "take" to mean, *inter alia*, to harm. 16 U.S.C. § 1532(19). Interior Department regulations, in turn, define the term harm to include "significant habitat

modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1999). It was on the basis of this regulation, and the evidence offered in respect to it, that the district court granted a preliminary injunction (later made permanent) restraining Boise from logging without a permit.

Specifically, in its opinion of April 1, 1998, the district court stated:

> Given the testimony of plaintiff's own witnesses, a taking is likely to occur if plaintiff logs the Walker Creek Unit. Plaintiff's expert testified at the hearing that the Walker Creek Unit is the best spotted owl habitat in the area, that it is not uncommon for such owls to leave a nesting site for a year in order to find a new mate, and that there is a "reasonable likelihood" that the male Walker Creek owl will return to nest in the Walker Creek Unit this year. Therefore, if Boise Cascade logs the Walker Creek Unit, it could easily harm the species and thus be liable for a taking under the ESA.

Boise Cascade Corp. v. Spear, No. CV 97-1810 (D. Or. April 1, 1998) (opinion and order granting preliminary injunction at 15-16.)

Given the district court's express finding that a logging of the Walker Creek Unit could easily harm the species and render Boise liable for a taking, it cannot be seriously argued now that the district court's injunction abridged the company's right to proceed without a permit. Rather, what the issuance of the injunction plainly indicates is that plaintiff was under a duty, in the first instance, to have applied for a permit. To have conducted a logging operation without it, would have amounted to a violation of law. We conclude, therefore, that the permit process was an obligatory component of the Endangered Species Act on which no claim

of taking may be based. A permit process that only temporarily curtails the use of private property cannot fairly be characterized as the appropriation of private property to public use. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 204 (1985) (Stevens, J., concurring).

The second argument that we consider is plaintiff's contention that the injunction resulted in a physical taking of its property because it authorized USFWS personnel to enter upon the property for purposes of conducting an owl survey and, additionally, because it barred Boise from prohibiting the occupancy of its property by the northern spotted owl. Plaintiff contends that these instances of "forced occupancy" amounted to a *per se* taking. We disagree.

The conditions that plaintiff describes were incidents of the permitting process that were transitory in character, involved no continuous governmental presence at the site and imposed no additional burdens on the property beyond the temporary curtailment of logging inherent in the permitting process itself. Limitations on property use of this character, which only temporarily affect the right to exclude, do not make out a takings claim, much less a takings claim alleging physical occupation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-36 (1982).

CONCLUSION

Based on the reasons stated, we allow defendant's motion to dismiss for failure to state a claim upon which relief can be granted. The Clerk is directed to enter judgment dismissing the complaint.

APPENDIX C

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed Apr. 10, 2001]

No. 99-860 L

BOISE CASCADE CORPORATION,

v.

THE UNITED STATES.

JUDGMENT

Pursuant to the court's opinion, filed April 10, 2001, allowing defendant's motion to dismiss for failure to state a claim upon which relief can be granted,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Margaret M. Earnest
Clerk of Court

By: /s/
Deputy Clerk

April 10, 2001

APPENDIX D

STOEL RIVES LLP
ATTORNEYS

STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE, SUITE 2300
PORTLAND, OREGON 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet: www.stoel.com

October 20, 1997

Phillip D. Chadsey
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Russell Peterson
Regional Director
U.S. Fish & Wildlife Service
911 NE 11th
Portland, OR 97232

Re: Walker Creek Northern Spotted Owl Site
Clatsop County

Dear Mr. Peterson:

This firm represents Boise Cascade Corporation that owns 65 acres of commercial timberlands in Clatsop County. This is the same land described in Charlie Stone's (from the Oregon Department of Forestry) letter of October 15, 1997 to

Mike Hicks of Boise Cascade, a copy of which was sent to you. A pair of spotted owls has been known to use Boise Cascade's property as a nesting site for at least the past six years. The State in 1993 designated 56 acres of Boise Cascade's property as protected spotted owl habitat under former OAR 629-24-809 (which has been renumbered so that it is now OAR 629-655-0210) and has prevented Boise Cascade from logging it.

As a result Boise Cascade sued the State for the taking of its property under the Just Compensation Clause to the Fifth Amendment to the U.S. Constitution and the similar provision of the Oregon Constitution. Last week the Circuit Court in Clatsop County granted Boise Cascade summary judgment on the issue of liability based on *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992).

As Mr. Stone indicated in his letter to Mr. Hicks, the State now considers the nesting site abandoned because the female has died and the male has moved to another nest site. Therefore, Boise Cascade intends to start logging its timber in the core area within the next few weeks.

If your agency intends to interpose an objection, please have your legal counsel contact me within the next 10 days.

Very truly yours,

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY

PDC:jss
Enclosure
cc: Mr. Joseph S. Munson

OREGON DEPARTMENT OF FORESTRY
STATE FORESTER'S OFFICE
2600 State Street
Salem, OR 97310
(503) 945-7200
TDD (503) 945-7213
TDD 1-800-437-4490

October 15, 1997

Mike Hicks
Boise Cascade Corporation
450 Pacific Avenue
Monmouth, Oregon 97361

Dear Mike:

Through routine surveying and tracking of northern spotted owls conducted by the Department of Forestry's Lands Management Program, it has recently been determined that the parcel of forestland retained by Boise Cascade Corp. (when it sold off other holdings to Agency Creek on 1991)on Walker Creek, located at SW 1/4 Section 6, T6N, R6W, in Clatsop County, no longer fits the criteria for being designated as a northern spotted owl nesting site as used in OAR 629-655-210 (formerly OAR 629-24-809).

For the purposes of this rule, nesting site means the tree, when known, that contains the nest, or when not known, the activity center, of a *pair of adult spotted owls*. Of the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at the Buster Quarry site more than eight miles away. No responses to surveying were registered this past season at the Walker Creek site.

In 1992, Boise Cascade filed notifications and written plans with the department for harvesting at this site. The

written plan for a portion of the tract was denied because it did not adequately address the protection of a 70 acre area of suitable habitat around the nesting site. With the information that we have now regarding the site, if a notification were filed for harvest on this area, there would be no requirement for a written plan under the Forest Practices Act based on the existence of a northern spotted owl nesting site. Of course, any other requirements for written plans, such as operating within 100 feet of a fish-bearing stream, would still apply.

Although this parcel no longer qualifies as a northern spotted owl nesting site under the Oregon Forest Practices Act, I do not know how it will be regarded by the U.S. Fish and Wildlife Service under the Endangered Species Act. Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. You may wish to consult with Fish and Wildlife Service officials before deciding any further course of action at the Walker Creek location. The Department of Forestry will be informing the U.S. Fish and Wildlife Service of our determination by copy of this letter.

Sincerely,

/s/ Charlie Stone
CHARLIE STONE
Forest Practices Director

CHS:na

cc: Members of the Oregon Board of Forestry
James E. Brown, State Forester
Russell Peterson, Regional Director, USFWS
Paula Burgess, Governor's Natural Resources Assistant
William Cloran, Asst. Attorney General
Phillip D. Chadsey, Stoel Rives, LLP

APPENDIX E

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR

Pacific Northwest Region
500 N. E. Multnomah Street, Suite 607
Portland, Oregon 97232

October 30, 1997

Phillip D. Chadsey
Stoel Rives
Standard Insurance Center
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
Fax: (503) 220-2480

RE: Walker Creek northern spotted owl site

Dear Mr. Chadsey:

I am in receipt of your letter of October 20, 1997, to Mr. Russell Peterson regarding the intent of Boise Cascade to harvest timber at the Walker Creek northern spotted owl site in Clatsop County, Oregon. The letter inquires whether the U.S. Fish and Wildlife Service ("Service") intends to object to the proposed timber harvest and requests a response from Service counsel. No information regarding Boise Cascade's past or planned timber harvest activities was included with your letter.

As you may be aware, under the spotted owl survey protocol endorsed by the Service, a spotted owl nest is not considered unoccupied unless owls have not been observed there for three successive years. This is because owls commonly return to nest sites they have previously used or other owls may use a previously occupied site. It appears the Walker Creek site was occupied at least as recently as 1996.

The information you sent does not indicate the circumstances surrounding the death of the Walker Creek female, whether the Walker Creek male continued to use the site, the nature of survey efforts in the area, whether survey efforts will continue in accordance with accepted protocol, or whether other owls are now using the site. It also appears that the proposed harvest includes or is in close proximity to nest trees. Based on the limited information you have provided, there may be a risk of "take" of one or more northern spotted owls if the area is immediately harvested.

Take of threatened species may be authorized through the issuance of an incidental take permit under Section 10 of the Endangered Species Act. Such a permit may be issued on the basis of an approved Habitat Conservation Plan (HCP) which includes appropriate conservation measures for habitat maintenance, enhancement, and protection.

The Service has assisted many parties in preparing HCPs. If Boise Cascade is interested in pursuing an HCP, a company representative should contact Mr. Gary Miller or Mr. Rich Szlemp of the Service's office. Mr. Miller or Mr. Szlemp may be reached at (503) 231-6179. If you would like to discuss this matter, please call me at (503) 231-6298.

For the Regional Solicitor

/s/ Steven Siegel
STEVEN SIEGEL
Attorney
U.S. Department of the Interior

cc: Russell Peterson, FWS
Gary Miller, FWS
Rich Szlemp, FWS

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Filed Dec. 19, 1997]

Civil No. CV97-1810-JE

BOISE CASCADE CORPORATION,
Plaintiff,

v.

MICHAEL J. SPEAR, REGIONAL DIRECTOR
FOR U.S. FISH & WILDLIFE SERVICE,
Defendant.

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF—FEDERAL QUESTION JURISDICTION

Jurisdiction

1. This action arises under the laws of the United States including the federal Endangered Species Act of 1973, as amended (the "ESA"), 16 USC § 1531, *et seq.*, and jurisdiction is based on 28 USC § 1331. Plaintiff seeks declaratory relief pursuant to 28 USC § 2201 and injunctive relief pursuant to FRCP 65.

Parties and Venue

2. Plaintiff is a Delaware corporation that is authorized to do business in the state of Oregon. Defendant is the Regional Director of the U.S. Fish and Wildlife Service (the "USF&WS"), whose responsibility it is to enforce the ESA within the state of Oregon. Venue is proper under 28 USC § 1391(b). The USF&WS is an agency of the Department of the Interior under the overall supervision of the Secretary of Interior.

Statement of Facts

3. Plaintiff is the owner of approximately 50 acres of merchantable timber in Clatsop County, Oregon, known as the Walker Creek Unit, that was used by a pair of northern spotted owls (*strix occidentalis caurina*) as a nesting site from 1990 to 1996. Much of the unit, which includes two nest trees, consists of old growth timber. Such timber is overly mature and is starting to decay and rot, causing the volume of merchantable wood to decline. Therefore, any delay in logging these trees will adversely affect their economic value to plaintiff. A severe winter storm could also cause such timber to fall and, in the course of doing so, damage the fallen tree or the adjacent timber and reduce its economic value.

4. In 1990 the USF&WS listed the northern spotted owl as a threatened species under the ESA. As a part of the listing process, the USF&WS was required by the ESA to designate "critical habitat" for the species and the agency was directed to do so in *Northern Spotted Owl v. Lujan*, 758 F Supp 621 (WD Wash 1991).

5. On July 7, 1990, the USF&WS issued "Incidental Take Guidelines" requiring that all property owners avoid harvesting core nesting areas, or "nest site/activity center[s]," which are defined as consisting of not less than 70 acres of suitable habitat used by young owls before the fledgling stage. The Walker Creek Unit is such a "nest site/activity center."

6. On October 2, 1991 the USF&WS rescinded the foregoing "Incidental Take Guidelines" because a federal court found that they had not been lawfully adopted. A copy of those guidelines and the memorandum rescinding them are attached as Exhibit 1. At no time since that date has the USF&WS ever adopted any regulation regarding northern spotted owl habitat that generally restricts or prohibits the

logging of suitable northern spotted owl habitat on private property in the state of Oregon. The only restriction on logging such habitat is where there is an imminent threat of actual injury to northern spotted owls known to be using that habitat. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F3d 781, 784-85 (9th Cir 1995).

7. On January 15, 1992 the USF&WS issued its final rule determining the critical habitat for the northern spotted owl. The agency only designated federally owned lands as critical habitat for the northern spotted owl. The USF&WS did not designate any private lands as critical habitat, and it excluded even those private lands that were physically situated within the boundaries of critical habitat units.

8. The USF&WS did not designate any land within Clatsop County as being critical habitat for the northern spotted owl. Even the federal timberlands within the county have not been so designated.

9. As used in the ESA, to "take" a species "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 USC § 1532(19) (1985). "[H]abitat modification or degradation, standing alone, is not a taking pursuant to section 9" of the ESA. 46 Fed Reg 54,748, 54,750 (1981).

10. Before October 1997, the Oregon Department of Forestry (the "ODF") had prohibited plaintiff from logging the Walker Creek Unit because it contained a northern spotted owl nesting site and was protected under Oregon law. On or about October 15, 1997, the ODF sent plaintiff a letter, a copy of which is attached as Exhibit 2, informing plaintiff that the ODF considered the owls to have abandoned the Walker Creek Unit as a nesting site because they did not use it during the 1997 nesting season. The DOF also advised plaintiff it should consult with the USF&WS before deciding

to log the unit because that agency might consider any significant alteration of owl habitat to be a taking under the ESA.

11. The USF&WS still considers the Walker Creek Unit to be an active nesting site, although the female owl died before the 1997 nesting season and the male owl found a new mate and used a different nesting site during the 1997 nesting season.

12. On October 29, 1997, plaintiff submitted a notification and written plan to the DOF to log its Walker Creek Unit, a copy of which is attached as Exhibit 3. That plan specifically provided:

> "If Northern Spotted Owls (NSO) are found on site, harvesting activities will be conducted outside of NSO nesting periods." (Exhibit 3 at 4.)

The DOF approved that plan, subject to the foregoing condition.

13. Harvesting the Walker Creek Unit poses no possibility that plaintiff's logging operations present an imminent threat to actually killing or injuring the pair of northern spotted owls known to have occupied that site in the past, because the female is dead and the male has moved to another nest site approximately eight miles away to join another female.

14. On December 2, 1997, two representatives of the USF&WS inspected plaintiff's Walker Creek Unit. As a result of that visit, the USF&WS, through its legal counsel, advised plaintiff that "[t]he removal of nesting habitat at the Walker Creek site, and the prey base associated with the high quality habitat, would create a risk of harm to the spotted owls which would use this site." The USF&WS's foregoing use of the word "harm" appears not to be restricted to an imminent threat of actually injuring or killing the owls that were known to have used the nest site in the past, but

apparently seeks to prevent logging suitable nesting habitat even though there are no owls known to be present in the area. That position is contrary to the law as stated by the Ninth Circuit in *Forest Conservation Council*, 50 F3d 781.

15. Taking or harming a northern spotted owl in violation of the ESA is a criminal act and any person violating it is also subject to more severe civil penalties. Thus, plaintiff has no adequate remedy at law.

16. The USF&WS has previously brought lawsuits against private property owners seeking to enjoin them from logging their timber because it was suitable owl habitat, even though that timber was more than a mile from the core area nest site, on the grounds that to harvest the timber would constitute an "incidental take" of the birds under the ESA. A copy of the government's complaint in one such suit is attached hereto as Exhibit 4.

FIRST CLAIM FOR RELIEF

17. Based on the foregoing facts, plaintiff seeks a declaration that plaintiff's logging of its merchantable timber on its Walker Creek Unit, while no northern spotted owls are actually present or known to be present in the area, would not constitute a "take" of that specie within the meaning of 16 USC § 1532(19) or otherwise be in violation of the ESA.

SECOND CLAIM FOR RELIEF

18. Based on the facts alleged in paragraphs 3 through 15, plaintiff seeks an injunction enjoining defendant and the USF&WS from taking any action to prevent plaintiff from logging its Walker Creek Unit and from seeking to enforce any provision of the ESA after plaintiff logs that property.

WHEREFORE, plaintiff prays as follows:

A. For a declaration that logging merchantable timber on private property, while no northern spotted owls are

actually present or known to be present in the area, cannot constitute a "take" within the meaning of the ESA.

B. For an injunction prohibiting defendant and the USF&WS from taking any action to prevent plaintiff from logging its Walker Creek Unit or from subsequently attempting to enforce any provision of the ESA against plaintiff after the property has been logged.

C. For plaintiff's costs and disbursements in this suit.

Dated: December 19, 1997.

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY, OSB No. 66028
Attorneys for Plaintiff

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 97-1810-JO

BOISE CASCADE CORPORATION,
Plaintiff,

v.

MICHAEL J. SPEAR, REGIONAL DIRECTOR
FOR U.S. FISH & WILDLIFE SERVICE,
Defendant.

FEDERAL DEFENDANTS' ANSWER TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND COUNTERCLAIM FOR INJUNCTIVE RELIEF

COME NOW federal defendants the United States of America, and MICHAEL J. SPEAR, in his official capacity as Regional Director of the United States Fish and Wildlife Service and answer plaintiff's complaint as follows:

Jurisdiction

1. The allegations contained in this paragraph consist of legal conclusions for which no response is required.

Parties and Venue

2. Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in the first sentence of this paragraph and on that basis deny them. The allegations contained in the second sentence of this paragraph are admitted. The allegations contained in the third sentence of this paragraph are conclusions

of law for which no response is required. The allegations contained in the fourth sentence of this paragraph are admitted.

Statement of Facts

3. Federal defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph and on that basis deny them.

4. The allegations contained in the first sentence of this paragraph are admitted. The allegations contained in the second sentence of this paragraph consist of legal conclusions for which no response is required.

5. With regard to the allegations contained in the first sentence of this paragraph, federal defendants admit that on July 7, 1990, the Service issued "Incidental Take Guidelines," which have since been rescinded, and further aver that the guidelines speak for themselves and provide the best evidence of their content. With regard to the allegations contained in the second sentence of this paragraph, federal defendants admit that the Walker Creek Unit is a nest site or activity center as defined in the Guidelines and deny all remaining allegations.

6. With regard to the allegations contained in the first sentence of this paragraph, federal defendants admit that the United States Fish and Wildlife Service rescinded the Incidental Take Guidelines and deny all remaining allegations. The allegations contained in the second sentence of this paragraph are denied. The allegations contained in the third sentence of this paragraph are denied. The allegations contained in the fourth sentence of this paragraph consist of conclusions of law for which no response is required.

7. The allegations contained in the first sentence of this paragraph are admitted. The allegations contained in the remainder of this paragraph purport to characterize the rule

determining critical habitat for the northern spotted owl, which is a document that speaks for itself and provides the best evidence of its content.

8. The allegations contained in this paragraph are admitted.

9. The allegations contained in this paragraph purport to describe the requirements of the Endangered Species Act and its implementing regulations, which speak for themselves and provide the best evidence of their content.

10. Federal defendants are without information or knowledge sufficient to form a basis as to the truth of the allegations contained in this paragraph and on that basis deny them.

11. With regard to the allegations contained in this paragraph, federal defendants admit that the Fish and Wildlife Service still considers the Walker Creek Unit to be an active nesting site and admit that the female owl died before the 1997 nesting season. Federal defendants lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in this paragraph and on that basis deny them.

12. Federal defendants are without information or knowledge sufficient to form a basis as to the truth of the allegations contained in this paragraph and on that basis deny them.

13. The allegations contained in this paragraph are denied.

14. The allegations contained in the first sentence of this paragraph are admitted. The allegations contained in the second and third sentences of this paragraph purport to characterize the contents of a document that speaks for itself and provides the best evidence of its content. The allegations contained in the fourth sentence of this paragraph consist of legal conclusions for which no response is required.

15. The allegations contained in this paragraph consist of legal conclusions for which no response is required.

16. The allegations contained in this paragraph are admitted.

FIRST CLAIM FOR RELIEF

17. The allegations contained in this paragraph purport to characterize plaintiff's complaint in this case; plaintiff's complaint is a document that speaks for itself and provides the best evidence of its content.

SECOND CLAIM FOR RELIEF

18. The allegations contained in this paragraph purport to describe plaintiff's request for relief in this case. Plaintiff's complaint and request for relief speak for themselves and provide the best evidence of their content.

COUNTERCLAIM

1. The Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, was enacted in 1973 for the express purpose of providing a means of conserving the ecosystems of endangered and threatened species, to provide a program for the conservation of such species, and to take appropriate steps to achieve the purposes of various treaties and conventions regarding wildlife protection as set out in the Act. 16 U.S.C. § 1531(b).

2. An "endangered species" is defined by the Act as any species which is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). A "threatened species" is defined as any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(20).

3. The ESA provides a means by which the Secretary of the Interior or the Secretary of Commerce may designate by regulation any species as threatened or endangered because of specified factors. 16 U.S.C. §1533(a)(1); *see also* 16 U.S.C. § 1532(15).

4. Without permit or other authorization, it is unlawful for any person to "take" wildlife listed as "endangered" within the United States or its waters. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21(c). By regulation, the prohibition against the taking of endangered species has been extended to species listed by the Secretary of the Interior as "threatened." 50 C.F.R. § 17.31(a). The taking of a "threatened" species in violation of this regulation is also a prohibited act under the Endangered Species Act. 16 U.S.C. § 1538(a)(1)(G); *see also* 50 C.F.R. § 17.31(a) and 16 U.S.C. § 1533(d).

5. The term "take" is defined by the Act to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such activity. 16 U.S.C. § 1532(19). Regulations promulgated by the Fish and Wildlife Service further define the term "harm" as follows:

> Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification, or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

6. The prohibition against takings applies equally to persons engaged in activities that are not intended or designed to take species listed under the ESA, but may do so incidentally. Incidental takings that do not jeopardize the continued existence of a listed species may be authorized by the Secretary pursuant to an incidental take permit issued under Section 10(a)(1)(B) of the Act. 16 U.S.C. § 1539(a)(1)(B). Activities involving incidental takings must be conducted in accordance with terms and conditions set out in the statement or permit.

7. The northern spotted owl (*Strix occidentalis caurina*) was listed as a threatened species on June 26, 1990; *see also*

50 C.F.R. 17.11(h). Its present range extends from as far north as southwestern British Columbia through western Washington, western Oregon, the coast range area of northwestern California and as far south as the San Francisco Bay. The owl is a nocturnal predator that prefers old-growth forests or forest with old-growth characteristics. 55 Fed. Reg. 26114-26118. Northern spotted owls have relatively large home ranges, and the available data indicate that a pair of owls requires large tracts of land containing significant acreage of old-growth to meet their biological needs. *Id.*

8. The northern spotted owl is threatened throughout its range primarily because of the loss and adverse modification of suitable habitat resulting from timber harvesting.

9. Plaintiff Boise-Cascade is the owner of approximately 50-65 acres of timber in Clatsop County, Oregon, known as the Walker Creek Unit. The Walker Creek Unit contains some of the best old-growth nesting habitat for northern spotted owls in the area. The Walker Creek Unit was used by a pair of northern spotted owls as a nesting site from 1990 to 1996. There is a reasonable likelihood that the site will be used again this spring for nesting by either the Walker Creek male or another owl pair.

10. Defendant United States alleges that the proposed harvest of the Walker Creek Unit by Boise will result in harm to and therefore a take of northern spotted owls occupying this nesting site by significantly modifying and degrading the habitat at the site in violation of Section 9(a)(1)(G) of the ESA, 16 U.S.C. § 1538(a)(1)(G), and 50 C.F.R. § 17.31(a). The government further alleges that this destruction of habitat will lead to the actual death or injury of the owls by significantly impairing their essential behavioral patterns, including breeding, feeding, and sheltering.

PRAYER FOR RELIEF

WHEREFORE, defendant, the United States of America, respectfully requests:

1. That a preliminary injunction issue enjoining plaintiffs from clearing any part or portion of the Walker Creek Unit area pending surveys conducted by the Fish and Wildlife Service or their representatives of the Walker Creek Unit during the upcoming 1998 breeding season (March 1-August 31), with leave to report the need for additional surveys at that time.

2. That final judgment be entered against plaintiff after examination of the survey data referenced above permanently enjoining the company from clearing any part or portion of the Walker Creek Unit until such time as such clearing will not result in a taking of a northern spotted owl or until such time as plaintiff has obtained a permit pursuant to Section 10(a)(1)(B) of the Endangered Species Act, 16 U.S.C. § 1539(a)(1)(B), permitting an incidental take of northern spotted owls.

3. That the United States be awarded its costs of suit, including attorneys' fees.

Respectfully submitted,

LOIS J. SCHIFFER
U.S. Department of Justice
Environment & Natural Resources Division

/s/ Christiana P. Perry
CHRISTIANA P. PERRY, Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Benjamin Franklin Station
P.O. Box 7369
Washington, D.C. 20044-7369

KRISTINE OLSON—Bar No. 73254
THOMAS C. LEE—Bar No. 76214
Assistant United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

OF COUNSEL:
Steve Siegel
Department of Interior
Portland, OR

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

1407 United States Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

May 1, 1998

Chambers of
ROBERT E. JONES
United States District Judge

Phillip D. Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268

Christiana Perry
DEPARTMENT OF JUSTICE
Environmental & Natural Resources Division
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Thomas Lee
UNITED STATES ATTORNEY'S OFFICE
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RE: *Boise Cascade Corp. v. Spear*,
Civil No. 97-1810-JO
LETTER ORDER correcting and clarifying
Opinion and Order
Dated April 1, 1998

Dear Counsel:

As Mr. Chadsey has correctly pointed out, the reference at the bottom of page 16 of my April 1, 1998 Opinion and Order should be to *defendant's* motion for a preliminary injunction.

Plaintiff's main obligation with respect to the surveying is to allow the surveying to proceed without interference. To the extent that defendant legitimately needs access to plaintiff's property to complete its surveying, plaintiff should grant such access. Plaintiff has no other *obligations* to participate in the surveying or to summarize its results, but the court encourages plaintiff to be reasonably cooperative.

The record reflects that surveys such as these have been conducted before, and the court anticipates that the surveying in this case can and will be completed without the court's further involvement. However, as always, if problems develop, please do not hesitate to call me for a speedy and cost-effective resolution.

Sincerely,

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Filed Oct. 15, 1998]

Case No. 97-1810-JO

BOISE CASCADE CORPORATION,
Plaintiff,

v.

MICHAEL J. SPEAR, REGIONAL DIRECTOR
FOR U.S. FISH & WILDLIFE SERVICE,
Defendant.

DECREE AND JUDGMENT

This matter came on for hearing on defendant's motion for preliminary injunctive relief before the Honorable Robert E. Jones, United States District Judge, to enjoin and restrain plaintiff from logging a tract of timber that it owns in Clatsop County, Oregon, known as the Walker Creek Unit. On April 1, 1998, this Court issued an Opinion and Order granting the preliminary injunction request and staying the case until September 4, 1998, pending surveying. The factual findings and conclusions of law set forth in that order and the attached Factual Findings and Conclusions of Law are incorporated by reference into this decree. On September 15, 1998, this Court held a status conference to evaluate the results of the surveying. On the basis of all evidence submitted by the parties, and arguments of counsel, this Court hereby finds and concludes that defendant is entitled to a permanent injunction in this matter.

Therefore,

IT IS ORDERED AND ADJUDGED that Boise Cascade Corporation, plaintiff herein, its officers, employees and agents, and all those in active concert with them, are hereby permanently enjoined and restrained from taking any northern spotted owls by the logging of any further timber in its Walker Creek Unit without a permit issued pursuant to Section 10 of the ESA. Plaintiff's counterclaim for injunctive and declaratory relief is dismissed.

Dated: October 15, 1998

/s/ Robert E. Jones
HONORABLE ROBERT E. JONES
U.S. District Judge

SUBMITTED BY:

/s/ Samuel D. Rauch
SAMUEL D. RAUCH, III,
Of Attorneys for Defendant

APPENDIX J

Endangered Species

Habitat Conservation Planning Handboók

U.S. FISH AND WILDLIFE SERVICE,

and

NATIONAL MARINE FISHERIES SERVICE.

November 1996

Page 1-7:

Processing an incidental take permit application consists of announcing the HCP and NEPA analysis in the *Federal Register* and making them available for public review and comment; evaluating comments received, if any; conducting a consultation under section 7 of the ESA; and determining whether the HCP meets statutory issuance criteria under section 10(a)(2)(B) of the ESA. These basic steps are required for all HCPs. However, specific document and processing requirements will vary depending on the size, complexity, and impacts of the HCP involved (see sections F.2-F.5 below). Other documents or actions that may be needed depending on the HCP include the Implementing Agreement (Chapter 3, Section B.8), Environmental Action Memorandum, a brief document that provides the Service's record of NEPA compliance for categorically excluded actions (Chapter 6, Section B.2), and legal review of the application package (Chapter 6, Section C.4).

Page 1-9:

* * * *

Low-effect HCPs and permit applications often involve a single small land or other natural resource owner and relatively few acres of habitat. The impacts of such projects on federally listed species frequently are minor or negligible and the applicants often do not have the resources to withstand long delays.

Consequently, an important guiding principle of the handbook is that permit application processing requirements for low-effect HCPs, as defined above, will be substantially simplified and permit issuance for such HCPs will be expedited to the maximum extent possible, consistent with Federal law.

* * * *

Page 1-14:

The handbook established the following target permit processing requirements for HCPs based on the NEPA action. Although not mandated by law or regulation, these targets are adopted as FWS and NMFS policy and all Service offices are expected to streamline their incidental take permit programs and to meet these targets to the maximum extent practicable.

Permit processing times are defined as the period between receipt of a complete application package, as defined in Chapter 6, Section B.2(b), to the issuance of the incidental take permit, including Federal Register notifications and public comment. The targets do not include any portion of the HCP development phase.

Section 10(a)(1)(B) Permit Application Processing Times:

NCP With EIS . . . . . less than 10 months
HCP With EA . . . . . .3-5 months
Low-effect HCP
(Categorically Excluded) . . .less than 3 months

These targets will apply as maximum processing times unless project controversy, staff or workload problems, or other legitimate reasons make delays unavoidable. However, in many cases it is expected actual processing times will be less than these targets and all FWS and NMFS offices are encouraged to improve on the targets whenever possible.

* * * *

APPENDIX K

[Page vii]

Executive Summary of the Northern Spotted Owl Recovery Plan

Introduction

A recovery plan is called for by the Endangered Species Act to guide the management actions needed to bring a threatened or endangered species to a condition in which it no longer needs special protection of the act. The northern spotted owl (also referred to in the recovery plan as the spotted owl and the owl) was placed on the list of threatened species in June 1990. Since February 1991, a Recovery Team appointed by Secretary of the Interior Manuel Lujan Jr. has been formulating a recovery plan for the spotted owl. This report presents a draft recovery plan for the northern spotted owl for review and comment by the public and government agencies.

The northern spotted owl draft recovery plan provides a comprehensive basis for management actions to be undertaken by forest landowners and wildlife agencies to alleviate conditions threatening the species. Primary actions will be taken by federal land management agencies in the Pacific Northwest – the U.S. Forest Service, the U.S. Bureau of Land Management, and the National Park Service. The U.S. Fish and Wildlife Service will oversee implementation of the plan through its authorities under the Endangered Species Act.

State forest management and wildlife agencies in Oregon, Washington, and California also will take actions that contribute to recovery under the plan. These state agencies have an important role in managing state forests and in

regulating forest practices on private land within their jurisdiction. Contributions from habitat on Indian lands also were considered in formulating the draft plan.

The draft recovery plan was developed following review of the scientific data from previous plans for the spotted owl, particularly the conservation strategy designed by the Interagency Scientific Committee (ISC) (Thomas et al. 1990), and by analyzing the most recent data available on owl populations and their habitat. This biological information was the basis for designing measures to achieve recovery.

[Page viii:]

Secretary of the Interior Lujan also asked that the Recovery Team consider other species and economic effects to the extent allowed by law. The Recovery Team made a substantial effort to determine the status and location of other species that could benefit from actions similar to those needed for owl recovery. Measures that would contribute to recovery of the owl, while also helping other species, were favored in decisions leading to the draft recovery plan.

Previous studies show that protection of sufficient habitat for a viable spotted owl population has substantial economic and social costs because of the reduction in timber harvests. The Recovery Team recognized that, under the Endangered Species Act, it could not consider measures short of achieving recovery for the northern spotted owl, even though such measures might cause significantly less economic and social losses. Instead, the Recovery Team looked for ways to achieve recovery that would cause less reduction in timber harvest and fewer job losses in the timber industry.

Recovery Objective

The objective of the draft recovery plan is to remove the northern spotted owl from the list of threatened species.

The Draft Recovery Plan

The northern spotted owl draft recovery plan has seven key elements:

1. A recovery objective and a set of criteria for determining whether conditions exist that would allow the northern spotted owl to be removed from the list of threatened species.
2. A network of designated conservation areas on federal forestlands, with each area designed to protect owl habitat sufficient to support a number of breeding pairs of owls.
3. A set of guidelines that govern management activities on federal forestlands in designated conservation areas.
4. A set of guidelines that govern management activities on federal forestlands outside of designated conservation areas.
5. A set of suggestions for contributions from nonfederal forestlands to support spotted owl populations.
6. A monitoring and research program that will provide new information on spotted owls and their habitat, and develop and test management techniques for promoting and maintaining owl habitat while allowing appropriate forest management.
7. Implementation mechanisms that provide oversight and coordination, relying primarily on existing authorities and forest management planning procedures.

Each of these elements is described briefly, followed by a discussion of the scientific basis for the plan and of the economic and social considerations built into the plan.

[Page ix:]

Delisting Criteria

The primary threat to the northern spotted owl leading to its designation as a threatened species is the reduction and fragmentation of its habitat in forests in Washington, Oregon, and northern California. Northern spotted owls use old-growth forests and other forests with similar characteristics for nesting, breeding, and rearing young. As timber harvesting has proceeded in the Pacific Northwest, the amount of habitat suitable for spotted owls has declined and remaining habitat areas have become smaller and more isolated from each other, particularly during the last 50 years. As a result, the population of spotted owls declined, in some areas rather sharply.

The objective of the draft recovery plan is to reduce the threats to the spotted owl so that it can be removed from the list of threatened species anywhere in its range. The decision to remove the spotted owl from the list of threatened species can be made on an incremental basis for individual areas, called provinces, or for groups of provinces. The range of the spotted owl has been divided into 11 provinces.

Four criteria must be met before delisting is considered: (1) A scientifically credible plan for monitoring owl populations and owl habitat must have been in effect for at least 8 years; (2) the population must have been stable or increasing, as indicated by both density and demographic estimates, for at least 8 years; (3) regulatory mechanisms or land management commitments must have been implemented that provide for adequate protection of breeding, foraging, and dispersal habitat, and (4) analyses must indicate that the population is unlikely to need protection under the Endangered Species Act during the foreseeable future. The draft recovery plan emphasizes that all of these criteria must be satisfied before delisting is considered.

Designated Conservation Areas

As the primary means for achieving recovery, the draft plan recommends establishing 196 designated conservation areas (DCAs) to provide approximately 7.5 million acres of federal forestland as the primary habitat for the northern spotted owl population. These DCAs include approximately 48 percent of the total remaining spotted owl nesting, roosting, and foraging habitat on federal lands (Figure ES.1.). The largest DCAs are designed to support a population of 20 or more pairs of owls in habitat conditions that allow successful breeding and rearing of young. They are located to allow owls to disperse from one DCA to another. Each DCA contains areas of currently existing owl habitat combined with areas of younger forests. These younger stands will be protected so they can mature into owl habitat. The DCAs contain approximately 1,180 known owl pairs on federal lands. This represents about 48 percent of the total pairs currently known on all federal lands (Figure ES.2.). When the DCAs become fully developed owl habitat, they will support a population of approximately 2,320 pairs of owls.

DCAs are located to take advantage of other forestland containing owl habitat that will not be harvested or will be harvested in a manner that does not reduce habitat value. Such areas include parks, wilderness areas, and certain administratively reserved areas. DCAs also are located in a pattern to reduce the risk to the owl population from natural threats such as fire, disease, and insects.

[Page 3:]

I.

A. The Northern Spotted Owl and the Endangered Species Act

1. How the Owl Came To Be Protected Under the Act

The U.S. Fish and Wildlife Service (FWS) first considered the possibility of listing the northern spotted owl (also referred to in the recovery plan as the spotted owl and the owl) under the Endangered Species Act in the early 1980s, but concluded that it would have been inappropriate. In 1987, a small organization known as GreenWorld, later joined by other environmental groups, petitioned the FWS to list the owl as endangered. The act's petition provisions required a preliminary finding within 90 days as to whether listing might be warranted. The FWS made a positive finding and initiated a review of the owl's status.

A second finding was required within 12 months of receipt of the petition. The second finding, directed at the question of whether listing was warranted, was more definitive than the 90-day finding. On December 17, 1987, the FWS found listing was not warranted.

The legality of the negative finding was challenged in court by several environmental groups, and the federal District Court in Seattle ruled that the finding appeared not to be supported by the status review that the FWS had conducted (see General Accounting Office 1989 for a review). When a judge ordered the FWS to produce a record that supported its decision, the FWS requested and was granted time to reconsider its finding in light of the most recently available information. In April 1989, the FWS made a finding that listing was warranted. A proposal to list the owl as a

threatened species was published in June 1989, and the owl was listed effective July 23, 1990.

2. The Endangered Species Listing Process

A process for ascertaining which species need attention is basic to any program of species conservation. Section 4 of the Endangered Species Act assigns this task to the Secretaries of the Interior and of Commerce, and operational authority within the two departments is delegated to the FWS and the National Marine Fisheries Service. The responsibilities and authorities for listing under the act are framed very broadly as the determination ". . . whether any species is an endangered species or a threatened species . . . ." Determinations are made by regulation through a proposal-and-comment process. In addition to this broad charge to the federal agencies to assess the status of species, the act provides a process for the public to petition for a species to be listed, and it makes the agencies accountable to petitioners. Some definitions are useful in understanding this assessment phase.

"Species" means any species or subspecies of plant or animal and, in the case of vertebrate life forms, may include any distinct population segment.

"Endangered species" means a species in danger of extinction throughout all or a significant portion of its range.

[Page 4:]

"Threatened species" means a species likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

The Endangered Species Act requires that listing decisions be made "solely on the basis of the best scientific and commercial data . . . ." In this context, "commercial data" refers solely to information regarding trade in a species or products derived from it, and does not allow the probable

economic consequences to affect a decision regarding a species' listing.

3. Critical Habitat Designation

The Endangered Species Act also directs the agencies to propose critical habitat "to the maximum extent prudent and determinable." Once again, the act's definitions are important.

"Critical habitats" are specific areas within the geographical area occupied by a species at the time of listing on which are found those physical or biological features (1) essential to the conservation of the species; (2) which may require special management considerations or protection; and (3) specific areas outside the area occupied by the species upon a determination that such areas are essential to its conservation.

"Conservation" means the use of all methods and procedures necessary to bring a species to the point at which the protective measures of the act are no longer necessary. Conservation is the process or means of achieving recovery. It is reasonable for the designation of critical habitat areas "essential to the conservation of the species" to consider the habitat needs identified in a recovery plan.

Designation of critical habitat is considered to be prudent when it would be of conservation benefit to the species for which it is designated. Critical habitat is determinable if sufficient information is available to adequately delineate the area or areas that should be included in the designation.

The act also requires an examination of the economic and other relevant impacts of the designation of critical habitat, and allows areas to be excluded from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, unless exclusion would lead to the extinction of the species.

In the proposed and final listing of the northern spotted owl, the FWS deferred designation of critical habitat as "not determinable." Critical habitat must be designated to the maximum extent prudent and determinable at the time a species is listed. If critical habitat is not determinable at listing, the act allows an additional year beyond the one in which listing must progress from proposed to final. At the end of the second year, critical habitat must be designated to the maximum extent prudent. In further consideration of the case that challenged the FWS's original petition finding, the court did not accept the FWS's argument that critical habitat for the owl was not determinable, and ordered the FWS to publish a proposal to designate critical habitat by April 29, 1991. A proposal for 11.6 million acres of critical habitat was published on May 6, 1991. A revised proposal that reduced the area to about 8.2 million acres, principally by excluding private, Indian, and state lands, was published on August 3, 1991, and a final designation of 6.9 million acres was issued on January 15, 1992.

[Page 18:]

Northern goshawks (*Accipiter gentilis*) also prey on adult and juvenile spotted owls (Forsman *et al.* 1984, Gutiérrez et al. 1985, Miller 1989, Johnson 1991 pers. comm.). Nevertheless, spotted owls will nest within a goshawk territory (Forsman *et al.* 1984) and will defend their young against attacks by goshawks (Gutiérrez unpub. data). Thus, goshawks probably are not serious threats to spotted owl populations.

Until recently, people rarely have encountered spotted owls and there has been no historic persecution by humans of this docile creature. The recent, conspicuous rise in spotted owl deaths at the hands of humans is a potential threat to local owl populations.

Diseases and Parasites

Disease and parasite infections represent another form of interspecific interaction because it is the relationship (in the broad biological meaning) of one organism with another. However, the topic of pathogens is treated separately here because it is treated separately in status analyses by the FWS when listing a species as threatened or endangered.

Relatively little is known about the diseases and parasites of spotted owls. Gutierrez (1989) conducted an extensive survey of hematozoan parasites (those that live in the blood) among all three subspecies of the spotted owl. Of the six hematozoan species found, all but one species occurred in the northern spotted owl. The infection rate was 100 percent, which was one of the highest rates of infection by these parasites recorded among birds (Greiner et al. 1975). However, spotted owls must be adapted to carry these high parasite loads because their survival rates are very high where infection rates are high (e.g., northwestern California, see following text). Hoberg *et al.* (1989) examined 20 northern spotted owls for helminth (worm) parasites and found eight species, representing nematodes (round worms), cestodes (flat worms), and acanthocephalans (spiny-headed worms). More than 80 percent of the birds were infected with at least one species; and multiple infections were common. Young *et al.* (In Review) reported two hippoboscid fly (louse) species from spotted owls in northwestern California. One species of fly was recorded only once among the 382 owls examined, but approximately 17 percent of the owls they examined were infested by the other species. Fly densities on owls were higher in years of higher summer and fall temperatures and lower winter precipitation. The authors speculated that low temperatures may have depressed survival of fly pupae. Finally, Forsman (pers. comm.) observed two nests where owlets had such high infestations of hippoboscids that the flies caused severe trauma to the young birds.

Habitat

Habitat selection and its context: Perhaps the most controversial aspect of the natural history of the spotted owl concerns its habitat requirements. Thomas *et al.* (1990:143-144) discussed the complex habitat needs of the northern spotted owl.

Most species exhibit variation in habitat selection (i.e., most species are not strict habitat specialists). Spotted owls are known to use many habitats. Empirical observations of spotted owls in different habitats can provide understanding of the birds' habitat requirements at three different levels (Peek 1986). *Habitat use* is the simple observation of an animal in a habitat without understanding the context of the observation. *Habitat selection* is the choice of a habitat or habitats among those that are directly available to the animal. *Habitat preference* is the selection of habitat that would be made by an animal [Page 19:] if all habitats were available to the animal. Thus, we have many observations of spotted owl habitat use, fewer studies of habitat selection, and no studies of habitat preference as defined by Peek (1986). Early studies portray the northern spotted owl as a denizen of primal forests (Grinnell and Miller 1944) based on observations of habitat use. However, Grinnell and Miller (1944) found that geographic variation in habitat use did exist in spotted owls. Subsequent investigations (Forsman 1976, 1980, Solis 1983, Forsman *et al.* 1984, Gutierrez *et al.* 1984, Solis and Gutierrez 1990, Sisco 1990, Blakesley *et al.* In Press, Bart and Forsman 1992) reaffirmed the naturalists' notions from observations of habitat use, but more importantly, provided analyses of habitat selection. Recent surveys of managed (i.e., previously logged private lands) forests have added to the knowledge of habitat use (Diller 1989, Irwin *et al.* 1989a, 1989b, Kerns 1989, Pious 1989). These latter observations are important, but their ecological significance is enigmatic because, unlike studies conducted

on public land, there is no supporting demographic information. It is essential that more demographic information be gathered to evaluate these populations (see section on spotted owl use of young, managed timberlands).

Variation in habitats used: Spotted owls are known to nest, roost, and feed in a wide variety of habitat types and forest stand conditions throughout their distribution (see discussion of suitable habitat elsewhere in this document). Spotted owls use western hemlock, mixed evergreen, mixed conifer, Douglas-fir, redwood, Douglas-fir/hardwood, evergreen hardwood, ponderosa pine, western red cedar, and other forest types in different parts of their range. Most observations of spotted owl habitat use have been made in areas having a component of old-growth and mature forests (Solis 1983, Forsman *et al.* 1984, LaHaye 1988, Sisco 1990, Ward 1990, Zabel *et al.* In Prep.; see additional summaries in Thomas et al. 1990). However, observations of spotted owls in managed (i.e., previously logged) stands are commonplace (Diller 1989, Kerns 1989, Pious 1989). Studies evaluating habitat selection show owl selection for mature and/or old forest stands with concomitant selection against young stands (Forsman 1980, Solis 1980, Carey et al. 1990, Blakesley *et al.* In Press). Selection for forest stands of intermediate age and size vary among the owls studied.

Nesting habitat: Most northern spotted owl nest sites observed on public lands have been located in old-growth or mature forests (Forsman *et al.* 1984, LaHaye 1988). In addition, the proportion of older seral stage forest surrounding nests has been significantly greater than it was in surrounding random sites in the same area (Meyer et al. 1990, Ripple *et al.* 1991). In areas of private managed forest, particularly in the California Klamath and California Coast physiographic provinces, where some uneven-aged silviculture has occurred or where fast tree growth facilitates rapid habitat development, spotted owls are known to nest in

managed stands, especially if residual old-growth characteristics are present (Forsman et al. 1977, Diller 1989, Pious 1989, Thomas *et al.* 1990; see Appendix B).

Spotted owls do not build their own nests; they depend upon suitable naturally occurring nest sites. In older-age forests, owls tend to nest in broken-top trees and cavities; they use platforms (i.e., abandoned raptor nests, squirrel nests, mistletoe brooms, debris accumulations) less frequently (Forsman *et al.* 1984, LaHaye 1988). In younger forests (i.e., forests less than 150 years old), nests more frequently are found on platforms (LaHaye 1988, Irwin et al. 1989a, Buchanan 1991). In one California study (LaHaye 1988), the proportion of platform nests used by spotted owls increased north to south, but the trend probably is related to the distribution of stand ages in that study rather than latitude.

The presence of suitable nest sites has been hypothesized as one possible basis for the use of old-growth by spotted owls (Forsman et al. 1984). However, owls [Page 20:] also use a variety of nest sites in younger-aged stands. But one critical piece of information should be assessed before this hypothesis can be tested. That is, the relative nesting success of birds using cavities and broken-top sites should be compared to that of birds using the presumably structurally less stable debris platforms. In any event, artificial nest sites probably could be provided for these birds (Madison and Woodbridge pers. comm.). European owls in the genus *Strix* readily use nest boxes (Southern 1970, Saurola 1989). If spotted owls behave in a similar fashion to other *Strix* owls, the availability of nest sites probably is not a critical management problem. However, a critical study of nest-box acceptance by spotted owls has not been conducted.

Several studies have been conducted on the structure of spotted owl nesting habitat (LaHaye 1988, Buchanan 1991, Self and Nelson 1991 pers. comm.). In the two studies that compared nest sites with available habitat, one in unmanaged

forest and the other in managed forest (LaHaye 1988 and Buchanan 1991, respectively), owls nested in forests that differed from what was available to them, suggesting selection by the owls. In general, owls preferentially used forests with greater complexity and structure. Nesting habitat structure reported by Self and Nelson in managed forests (1991 pers. comm.) was strikingly similar to the habitat structure used by foraging spotted owls in unmanaged stands within the same province (Solis 1983).

Roosting habitat: Northern spotted owl roosting habitat has been described by Forsman (1976), Barrows and Barrows (1978), Forsman (1980), Solis (1983), Forsman *et al.* (1984), Chavez-Léon (1989), Sisco (1990), and Blakesley *et al.* (In Press). Roost sites are typically areas of relatively dense vegetation (high canopy closure dominated by large-diameter trees). During the summer these sites are usually cool, shady spots near streams or are on the lower third of slopes (possibly a simple correlation with stream position; Forsman 1976, Solis 1983, Blakesley *et al.* In Press). Spotted owls respond to variation in temperature and exposure by moving within the canopy to find favorable microclimate conditions (Forsman 1976, Barrows and Barrows 1978, Forsman 1980, Barrows 1981, Solis 1983, Forsman *et al.* 1984). The multistoried stand structure of roost sites facilitates this movement. Because of this observed behavioral response to variation in temperature, it has been hypothesized that old-growth forests are necessary to spotted owls for them to avoid heat stress (Barrows and Barrows 1978). However, Gutierrez (1985) pointed out that there are other plausible hypotheses to explain the associated owls with old-growth.

Foraging habitat: Of the major spotted owl habitat categories, feeding habitat appears to be the most variable (summarized in Thomas et al. 1990). This is predictable given the highly variable distribution and abundance patterns of the owl's primary prey (Ward 1990). Within a given

geographic province, foraging habitat may be more variable than either nesting or roosting habitat. Nevertheless, spotted owl foraging habitat is characterized by high canopy closure and complex structure. Comparisons of habitat among unmanaged stands used by foraging owls and managed stands occupied by nesting owls shows a surprising concordance of structural habitat features in California (Appendix B).

Solis and Gutierrez (1990) presented evidence that male and female spotted owls may segregate their foraging habitat. The smaller males appeared to be using stands that had higher tree density than were the larger females, which foraged in less dense habitats. Earhart and Johnson (1970) suggested that differential habitat use by male and female owls may occur because the high wing loading of the females would make them less maneuverable than males. However, this probably would be a consequence rather than a cause of reversed sexual dimorphism (Muller 1986, Solis and Gutierrez 1990).

[Page 51:]

Douglas-fir stands (less than 50 years old). The nearly simultaneous harvesting of large contiguous blocks of industrial-owned lands has created expanses of relatively young forests that isolate the residual suitable habitat and occupied owl sites. Clear-cutting has been the predominant harvest practice within the province.

Few clusters containing more than three pairs of owls exist north of Highway 126. Here, in the northern two-thirds of the province, individual owl sites are generally separated by 3 to more than 15 miles.

Predation and Competition. Great horned owls and northern spotted owls were surveyed in the central Coast Range in 1990 and 1991. Great horned owls were nearly seven times more numerous than spotted owls (Table 2.5).

As great horned owls are key predators on spotted owls, this great relative abundance is of concern. Barred owls are distributed throughout the province and have been recorded at 46 sites from 1980 to 1991. The goshawk population is very low in the Coast Range.

Province Isolation. The province is connected to the western Cascades province in Oregon through forested lands south of Eugene, and to the Klamath and western Cascades provinces south of Canyonville. These key linkage areas contain BLM and private lands in a checkerboard pattern. Due to past and present timber harvest on federal and intervening state and private lands, habitat is particularly limited. For example, BLM lands within 50 percent of the quarter-townships in this area do not contain owl habitat adequate for dispersal (i.e., do not meet the "50-11-40 rule" as described in Thomas et al. 1990). Therefore, the risk of isolation of the Oregon Coast Range province is high and will increase with additional harvest of habitat.

Historically, there was probably a significant connection between the Oregon Coast Range province and the western Washington lowlands province, with owls crossing the Columbia River. Timber harvest since 1920 likely has eliminated this connection. To increase the likelihood of owl recovery in these provinces, habitat would have to be developed along both sides of the Columbia River to reestablish the connection between these two provinces.

Vulnerability to Natural Disturbance. Extensive fires historically have removed large areas of habitat, although return intervals have been long, and annual risk is fairly low. Because current suitable habitat areas are limited and disconnected, disturbance events could remove key areas.

Western Oregon Cascades

This province lies west of the crest of the Cascade Mountains and extends the length of the state from the

Columbia River to the California border. Habitat extends from the eastern edge of the Willamette Valley upslope to about 5,000 feet, and from the moist, true-fir forest in the north to the dry, mixed conifer-pine-oak woodlands in the south. Ownership in this province is 54 percent Forest Service, 34 percent private, 10 percent BLM, and 2 percent state (Figure 2.5a).

Low Populations. Owl populations within this province are moderately high, as is the amount of remaining habitat on federal lands. Areas with low owl numbers occur on 1) private lands, 2) checkerboard BLM lands at lower elevations, 3) checkerboard Forest Service lands in the Santiam Pass area, and 4) higher elevation forests near the Cascade Crest. There are approximately 925 known spotted owl pair sites in this province. Owl use of habitats above 5,000 feet elevation is very limited and few pairs successfully nest above 4,500 feet in this province.

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Filed Dec. 10, 1998]

Civil No. CV '98-1538

BOISE CASCADE CORPORATION,
a Delaware corporation

Plaintiff,

v.

RUSSELL D. PETERSON, STATE SUPERVISOR FOR U.S. FISH AND WILDLIFE SERVICE,

Defendant.

COMPLAINT

Mandamus To Require Defendant To Take Action on Plaintiff's Application for an Incidental Take Permit

Jurisdiction

1. This mandamus proceeding is brought pursuant to the All Writs Act, 28 USCA § 1651(a) (1994) and 28 USCA § 361 (1993).

Parties

2. Plaintiff is a Delaware corporation and the owner of a parcel of commercial timberland in Clatsop County, Oregon, known as the Walker Creek Unit (the "Unit"). Defendant is the Regional Director of the U.S. Fish and Wildlife Service (the "USFWS"), who is charged with the duty and responsibility of enforcing and implementing the provisions of the Endangered Species Act (the "ESA"), 16 USCA § 1531, *et seq.* (1985 & Supp 1998).

Claim for Relief

3. The Unit from 1990 to 1996 was the nesting site for a pair of Northern Spotted Owls. In 1990 the Northern Spotted Owl was listed by the USFWS as a threatened species pursuant to the provisions of the ESA.

4. Before the 1997 nesting season, the female Walker Creek Northern Spotted Owl died and the male Walker Creek Northern Spotted Owl found a new mate at another nesting site. In October 1997 plaintiff sought approval from the Oregon Department of Forestry (the "ODF") to log the Unit. The ODF approved that logging plan, but advised plaintiff that it might be in violation of the ESA if it did not obtain an Incidental Take Permit ("ITP") from the USFWS before logging the Unit.

5. Plaintiff then sought a determination from defendant that an ITP was not required because the Walker Creek Northern Spotted Owls had abandoned the site and, therefore, could no longer be "taken" as a result of plaintiff logging the Unit. After the USFWS failed and refused to tell plaintiff whether an ITP would be required before plaintiff could log the Unit, plaintiff brought suit in this court, *Boise Cascade Corporation v. Michael J. Spear, Regional Director, etc.*, Civil No. 97-1801-JO, seeking a declaratory judgment that the logging of its timber would not result in a violation of the ESA and seeking an injunction barring defendant from enforcing it against plaintiff on account of logging the Unit.

6. Defendant then filed a motion seeking to dismiss that suit on various grounds, including that there was no "case or controversy" within the meaning of Article III of the U.S. Constitution because the USFWS had not threatened plaintiff with either civil or criminal prosecution if it logged the Unit.

7. After an ODF wildlife biologist testified at the hearing on plaintiff's motion for a preliminary injunction that plaintiff's Unit was probably the best Northern Spotted Owl

habitat in the northern part of the Oregon Coast Range, this court gave defendant 10 days in which to file a counterclaim if it wanted to prevent plaintiff from logging its timber. On the tenth day, defendant filed a counterclaim seeking an injunction preventing plaintiff from logging the Unit. This court then granted defendant an injunction barring plaintiff from doing any further logging on the Unit, pending a further order of the court, and it dismissed plaintiff's suit against defendant.

8. After a subadult Northern Spotted Owl was found to have been in the area of the Unit during the 1998 nesting season, this court made its injunction permanent, barring plaintiff from logging the Unit unless it obtained an ITP, pursuant to section 10 of the ESA.

9. After this court issued its initial injunction, plaintiff filed a legal action in the United States Court of Federal Claims alleging that the Unit had been taken by the federal government for a public purpose and seeking just compensation pursuant to the Fifth Amendment.

10. As a defense to that action, the government alleged that plaintiff's takings claim was not "ripe" because it had not sought an ITP from defendant. On November 5, 1998 plaintiff agreed to dismiss its takings action without prejudice and the claims court did so to facilitate the pursuit and completion of plaintiff's administrative remedies.

11. On November 6, 1998 plaintiff submitted to the government a Habitat Conservation Plan (the "HCP") for the Unit, along with an application for an ITP and the appropriate fee.

12. The HCP stated that plaintiff required action on its ITP by not later than December 10, 1998, so that logging could be completed by March 1, 1999.

13. Plaintiff has timber on the Unit that has blown down and will no longer be of merchantable quality if it is not removed within the next few months. To gain access to that timber, plaintiff must be able to log other timber on the Unit. Also, much of the timber in the Unit is overly mature and decaying, thus causing it to lose value and become a safety hazard to persons in the area. Therefore, any delay in approving the ITP will cause plaintiff irreparable harm.

14. Defendant is required to give the public notice of plaintiff's application for an ITP by publication in the Federal Register, which is followed by a 30-day period to allow public review and comment on the HCP, before the USFWS can either grant or deny the ITP.

15. Defendant has failed and refused to publish the required notice in the Federal Register or otherwise take action upon plaintiff's application for an ITP.

WHEREFORE, plaintiff prays for an order of this court requiring defendant to:

1. Publish without further delay notice of plaintiff's application for an ITP;

2. As soon as the period for public review expires, either grant or deny the requested ITP.

DATED: December 10, 1998.

STOEL RIVES LLP

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY, OSB No. 66028
(503) 294-9376
Of Attorneys for Plaintiff
Boise Cascade Corporation

Supreme Court, U.S.
FILED

02 862 NOV 27 2002

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware corporation,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

SUPPLEMENTAL APPENDIX

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33 pp

CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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The Decision and Judgment of the United States Court of Appeals for the Federal Circuit (No. 01-5106), entered September 3, 2002 and reported at 296 F.3d 1339, affirming the Court of Federal Claims' dismissal of Petitioner's claim for a physical taking. sa-1

APPENDIX M

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 01-5106

BOISE CASCADE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Decided: July 19, 2002.
Rehearing and Rehearing En Banc Denied: Sept. 3, 2002.

Before CLEVENGER, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

CLEVENGER, *Circuit Judge*.

Boise Cascade ("Boise") appeals the judgment of the Court of Federal Claims dismissing its complaint for failure to state a claim. *Boise Cascade Corp. v. United States*, No. 99-860 L (Ct. Fed. Cl. April 10, 2001). We affirm.

I

This case involves a 65-acre tract of old-growth forested land known as the Walker Creek Unit, located in Clatsop County, Oregon. Boise owns the Walker Creek Unit, which was home to a nesting pair of northern spotted owls until late 1996. The spotted owl is listed as a threatened species under

the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, and is protected by both the federal government and the State of Oregon.

In January 1997 the nesting female spotted owl was found dead, and the male spotted owl moved to a new nesting area, and a new mate, a few miles from the Walker Creek Unit. In October 1997, the Oregon Department of Forestry ("ODF"), which until that time had prevented Boise from logging in order to protect the owl pair, notified Boise that it was lifting the restriction due to the departure of the male owl. In the letter, however, the ODF warned Boise that the U.S. Fish and Wildlife Service ("Service") might consider logging the land to be a violation of the ESA,[1] and that it therefore recommended consulting the Service before starting to log the land. The Service inspected the land—at Boise's invitation—and determined that logging the parcel could harm spotted owls that might otherwise use the site for nesting. Thus, the Service notified Boise that either it could file an application for an Incidental Take Permit ("ITP") [2] under section 10 of the ESA if it wished to log the land, or alternatively it could try to enter into a land swap with the State of Oregon. Boise responded by filing suit in federal district court in Oregon seeking a declaratory judgment that its proposed logging operation would not take any spotted owls, and requesting

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[1] The ESA prohibits the take of a listed species. 16 U.S.C. § 1538(a)(1) (2000). Taking includes harassing, harming, pursuing, wounding, and killing the animal, *id.* § 1532(19), and the Environmental Protection Agency ("EPA") has interpreted "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2000). Thus, deforestation of breeding habitat constitutes harm under the statute.

[2] The Secretary has discretion to issue an ITP to permit "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B) (2000).

that the court enjoin the Service from enforcing the ESA against Boise. The United States filed a counterclaim asking the court to enjoin Boise from logging the Walker Creek Unit. *Boise Cascade*, slip op. at 3.

After an initial hearing, the district court dismissed Boise's complaint on ripeness grounds[3] and granted the United States's motion for a preliminary injunction preventing logging pending the results of the Service's 1998 breeding season surveys. Because the United States's counterclaim for a permanent injunction created a ripe controversy, the court allowed Boise leave to file a counterclaim seeking the relief it originally sought in its complaint. During the breeding season survey conducted during the pendency of the preliminary injunction, a juvenile spotted owl was discovered living on the Walker Creek Unit. On October 15, 1998, the district court issued an order dismissing Boise's counterclaims and granting the United States's request to permanently enjoin Boise from logging the Walker Creek Unit without an ITP. Boise did not appeal the entry of the injunction.

Boise applied for an ITP on November 6, 1998. At a hearing on February 5, 1999, the district court ordered the Service to act on the permit application by September 1999. On May 17, 1999, the juvenile spotted owl that had been living at the Walker Creek Unit was found dead. After subsequent surveys found no living owls in the area, on July 30, 1999, the Service sent the following notice to Boise:

> Based on our review of all the information concerning this site over the last three years and the new survey

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[3] At the time Boise filed its complaint seeking declaratory relief, the Service had not yet taken any final action with respect to logging the Walker Creek Unit, but rather had simply opined that such logging could violate the ESA by taking owls and suggested that Boise apply for an ITP. Thus, the district court held that Boise's claim for a declaratory judgment was not ripe.

> results, the best scientific information currently available indicates that no spotted owls would be taken by Boise Cascade's planned harvest of the property. Therefore, an Endangered Species Act incidental take permit is no longer required.

The district court lifted the injunction on August 17, 1999.

Boise filed a complaint at the Court of Federal Claims on October 6, 1999, seeking just compensation for the "temporary taking of merchantable timber, which it was prevented from logging" due to the injunction entered by the district court in Oregon. Boise advanced four different theories to support its takings claim: (1) a physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), based on the denial of its right to exclude spotted owls from its property and the requirement that it allow government personnel to enter the property to conduct owl surveys during the pendency of the preliminary injunction; (2) a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), based on the 18-month ban on logging without a permit imposed by the district court's injunction; (3) an exaction-type taking under *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), based on the argument that the injunction did not substantially advance a legitimate government interest under the ESA; and (4) a temporary regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). *Boise Cascade*, slip op. at 5. The government moved to dismiss the complaint on the ground that the injunction merely prohibited Boise from logging without a permit, and that it therefore did not constitute a taking as a matter of law under *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). The government also moved to dismiss the *Loretto* claim specifically on the ground that there

was no forced governmental intrusion and hence no physical taking of the property. Boise cross-moved for summary judgment on all four of its takings theories.

The court denied Boise's motion without prejudice pending disposition of the government's motion to dismiss, which it considered to raise threshold legal issues. *Boise Cascade*, slip op. at 6 & n. 4. The court ultimately found both of the government's arguments persuasive, and granted its motion to dismiss on both grounds. Boise now appeals. We exercise jurisdiction over this appeal from a final judgment of the Court of Federal Claims under 28 U.S.C. § 1295(a)(3).

II

We review *de novo* the legal question whether the Court of Federal Claims properly dismissed Boise's complaint for failure to state a claim. *Dehne v. United States*, 970 F.2d 890, 892 (Fed.Cir.1992). "[I]n reviewing a dismissal for failure to state a claim, we must assume all well- pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed.Cir.1991).

The Takings Clause of the Fifth Amendment prohibits the government from taking property for public use without "just compensation." U.S. Const. amend. V. This court has developed a two-step approach to takings claims. "First, a court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a 'stick in the bundle of property rights.'" *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed.Cir.2000) (internal citation omitted). If so, the court proceeds to the second step, determining "whether the governmental action at issue constituted a taking of that 'stick.'" *Id.* In this case we may proceed directly to the second step of our analysis, for the government does not contest that Boise possesses a property interest in both its fee

simple estate in the Walker Creek Unit and its ownership of the timber that grows there. The issue, then, is whether Boise's complaint has sufficiently alleged that the government took either of these interests.

A

Before reaching the substantive issue in this case, however, we must address a threshold challenge to the trial court's and hence our jurisdiction. The government argues that Boise has asked the trial court to review the merits of a decision made by a United States district court, and that the Court of Federal Claims does not have jurisdiction to hear such a case. It is true that Article III forbids the Court of Federal Claims, an Article I tribunal, from reviewing the actions of an Article III court such as the Oregon district court. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a 'judicial Power' is one to render dispositive judgments.'" (quoting Easterbrook, *Presidential Review*, 40 Case W. Res. L.Rev. 905, 926 (1990))). Furthermore, we have previously affirmed that the Court of Federal Claims "cannot entertain a taking claim that requires the court to 'scrutinize the actions of' another tribunal." *Vereda Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed.Cir.2001) (quoting *Allustiarte v. United States*, 256 F.3d 1349, 1352 (Fed.Cir.2001)).

However, resolution of this case did not require the Court of Federal Claims to review the merits of the district court's order enjoining Boise from logging without a permit. Boise has accepted the validity of the injunction, and only filed suit in the Court of Federal Claims to determine whether the Service's assertion of jurisdiction over it by seeking and

obtaining the injunction worked a taking of its property that requires compensation under the Takings Clause. Whether or not the government action took Boise's property was not before the district court, nor could it have been. Because Boise seeks over $10,000 in compensation for this alleged taking,[4] the Court of Federal Claims is the sole forum available to hear Boise's claim. *See* 28 U.S.C. § 1346(a)(2) (2000). Because the takings claim does not require the trial court to review the district court's actions, there is no constitutional defect in the Court of Federal Claims' assertion of jurisdiction over this case.

The government argues that this case is indistinguishable from *Allustiarte* and *Vereda*, and that those cases therefore mandate dismissal here. We disagree. In *Allustiarte*, the plaintiffs claimed that the court-appointed bankruptcy trustee committed various errors in his management of the bankruptcy estate, and that the bankruptcy court improperly approved the errors. *Allustiarte*, 256 F.3d at 1351. The plaintiffs alleged takings based on the losses they suffered as a result of those alleged errors. *Id.* The trial court dismissed for lack of jurisdiction, and we affirmed because adjudication of the takings claim would require the court to review the propriety of the bankruptcy court and trustee's actions. Such review was committed to the district court and the Ninth Circuit, and save by appeal to those courts, the merits of the bankruptcy court's decision could not be attacked. *Id.* at 1352. In *Vereda*, the plaintiffs had a mortgage interest in an airplane that had been seized by the Drug Enforcement Administration, and had been forfeited in an *in rem* administrative forfeiture proceeding. *Vereda*, 271 F.3d at 1369. Vereda's taking claim in the Court of Federal Claims was based solely "on a challenge to the substantive validity of the forfeiture of its interest in the airplane." *Id.* at 1374. We held that the trial court lacked jurisdiction over the claim "because

[4] Boise seeks $295,012 in compensation for the alleged taking.

the relevant statutes provide for a comprehensive administrative and judicial system to review the *in rem* administrative forfeiture," which preempted Tucker Act jurisdiction in the Court of Federal Claims. *Id.* at 1375. We also noted that, because the administrative forfeiture was by statute given "the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States," *id.* (quoting 19 U.S.C. § 1609(b)), the trial court was precluded, under *Allustiarte*, from reviewing the merits of the forfeiture. The trial court therefore had no jurisdiction over Vereda's takings claim because it was based on whether the substantive provisions of the forfeiture statute had been correctly applied. *Id.*

Boise's situation differs in several important respects from that of the parties in *Allustiarte* and *Vereda*. First, unlike in *Allustiarte*, the government here is not merely an impartial judicial arbiter whose actions have been improperly appealed to the Court of Federal Claims instead of to the appropriate district court or regional circuit court of appeals. The Service, a government agency, filed a claim against Boise seeking to enjoin its logging activities. That the Service chose to effectuate its mandate to enforce the ESA through a court action rather than through an agency cease and desist order, for instance, cannot insulate the United States from its duty to pay compensation that may be required by the Fifth Amendment. Second, unlike in *Vereda*, Congress has not instituted a comprehensive scheme of administrative and judicial review of possible takings of property occasioned by the Service's enforcement of the ESA. As noted above, the Court of Federal Claims is the *only* forum in which Boise's takings claims could have been brought. Finally, unlike in *Vereda* and *Allustiarte*, Boise's takings claim is not based on the propriety of the district court's decision, and the trial court therefore would not be called upon to review the merits of the district court's decision in order to decide the merits of

Boise's claim. Thus, we hold that the trial court properly assumed jurisdiction of the merits of Boise's Tucker Act claim.

B

The government asserts that no taking could occur in this case because the injunction, which forms the basis for all of Boise's regulatory takings claims,[5] did no more than require that no logging take place without a permit. The government's argument is based largely on the Supreme Court's decision in *Riverside Bayview*. In that case, the Supreme Court analyzed whether the Clean Water Act authorizes the Army Corps of Engineers ("Corps") to require landowners to obtain permits before filling wetlands adjacent to navigable bodies of water. *Riverside Bayview*, 474 U.S. at 123, 106 S.Ct. 455. Riverside Bayview owned such a tract of land and began filling it in preparation for building condominiums. Based on its regulations interpreting the Clean Water Act, the Corps believed that the property was subject to its regulatory jurisdiction. Therefore, the Corps sued Riverside Bayview seeking to enjoin further filling without a permit from the Corps. *Id.* at 124, 106 S.Ct. 455. The district court granted the injunction, and the Sixth Circuit reversed, holding that the statute must be construed narrowly to preclude the Corps' assertion of jurisdiction over Riverside Bayview's land. *Id.* at 125, 106 S.Ct. 455. The Sixth Circuit adopted a narrow construction of the statutory term "waters of the United

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[5] Although the government also urges us to affirm the dismissal of Boise's *Loretto* claim on the basis of *Riverside Bayview*, *Riverside Bayview* does not control where the government allegedly takes an easement in or physically occupies the Walker Creek Unit. The *Loretto* claim is independent of the regulatory takings claims flowing from the permitting requirement imposed by the district court. It is only the claims based on the imposition of the permitting requirement that fall under the rule articulated by the Court in *Riverside Bayview*.

States" because, "in its view, a broader definition of wetlands might result in the taking of private property without just compensation." *Id.*

The Supreme Court reversed, holding that the Sixth Circuit interpreted the statute too narrowly. In the portion of its opinion relevant to this case, the Court addressed the Sixth Circuit's concern that a broad interpretation of the statute would violate the Takings Clause. The Court first set forth the general rule with respect to when land use regulations may constitute a taking: "if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Id.* at 126, 106 S.Ct. 455 (quoting *Agins*, 447 U.S. at 260, 100 S.Ct. 2138). The Court explained,

> we have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. The reasons are obvious. *A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use his property as desired.* Moreover, even if the permit is denied, there may be other viable uses available to the owner. *Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.*

Id. at 126-27, 106 S.Ct. 455 (emphases added and internal citation omitted). *Riverside Bayview* presents a problem for Boise because Boise's position is very similar to that of the landowner in *Riverside Bayview*. Like the *Riverside Bayview* landowner, Boise was enjoined from proceeding with a particular activity without a permit at the behest of the government agency that administers the pertinent permit

program. Thus, under the Court's approach in *Riverside Bayview*, the injunction never ripened into a taking because the Service never denied Boise's permit.

However, Boise argues that far from foreclosing its claim, *Riverside Bayview* actually supports its theory that a taking occurred. Boise's argument rests on the *Riverside Bayview* Court's statement that even though the Corps' denial of a permit could under certain circumstances be a taking, because an aggrieved landowner can seek compensation under the Tucker Act, "fears that application of the Corps' permit program might result in a taking did not justify the court in adopting a more limited view of the Corps' authority than the terms of the relevant regulation might otherwise support." *Id.* at 128-29, 106 S.Ct. 455. The Court then noted that:

> Because the Corps has now denied respondent a permit to fill its property, respondent may well have a ripe claim that a taking has occurred. On the record before us, however, we have no basis for evaluating this claim. . . . In any event, this lawsuit is not the proper forum for resolving such a dispute: if the Corps has indeed effectively taken respondent's property, respondent's proper course is not to resist the Corps' suit for enforcement by denying that the regulation covers the property, but to initiate a suit for compensation in the Claims Court. *In so stating, of course, we do not rule that respondent will be entitled to compensation for any temporary denial of use of its property should the Corps ultimately relent and allow it to be filled. We have not yet resolved the question whether compensation is a constitutionally mandated remedy for "temporary regulatory takings," and this case provides no occasion for deciding the issue.*

Id. at 129 n. 6, 106 S.Ct. 455 (emphasis added and internal citations omitted) (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct.

3108, 87 L.Ed.2d 126 (1985)). According to Boise, footnote six of *Riverside Bayview* describes its own situation because, of course, the Service did eventually relent and allow logging on the Walker Creek Unit. Thus, argues Boise, *Riverside Bayview* supports its takings claims because it is simply following the course suggested by the Court: not resisting the injunction and suing in the Court of Federal Claims for just compensation. Furthermore, while the *Riverside Bayview* Court refused to address whether a "temporary regulatory taking" would be compensable, the Court recently held that no per se rule applies to temporary moratoria and that whether they are takings must be analyzed under *Penn Central*. *See Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 1489, 152 L.Ed.2d 517 (2002). Thus, if they survive a *Penn Central* analysis, temporary moratoria can be compensable takings. Hence, argues Boise, footnote six of *Riverside Bayview* compels a reversal in this case.

Boise's interpretation of footnote six is untenable in light of the *Riverside Bayview* Court's earlier explanation regarding when a taking occurs, *i.e.*, after a permit has been denied. Read together with the rest of its opinion, the Court's statement in footnote six regarding compensation for a temporary regulatory taking clearly refers not to normal delays pending a permitting decision, but rather to a situation in which the government first denies a permit but then later relents and lifts the restriction. In other words, the initial denial of a permit is still a necessary trigger for a ripe takings claim.[6] If the government denies a permit, then the aggrieved party can seek compensation. If at some point the government reconsiders the earlier denial and grants a permit (or

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[6] An extraordinary delay in permit processing or bad faith on the part of the agency can give rise to a ripe takings claim notwithstanding the failure to deny the permit. *See Wyatt v. United States*, 271 F.3d 1090, 1097-98 (Fed.Cir.2001).

revokes the permitting requirement), then the aggrieved party can seek compensation for a "temporary regulatory taking." In either case, *Penn Central* will govern whether the initial denial of the permit actually took the property in question. Thus, *Riverside Bayview* supports the proposition that Boise cannot bring a takings claim because the Service never denied Boise's permit.

As the government notes, in *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed.Cir.1993), we applied *Riverside Bayview* to a situation extremely similar to the one confronting us here. In *Tabb Lakes* the Corps, tipped off by an anonymous source, issued a cease and desist order to Tabb Lakes, which had been filling what the Corps considered at the time to be wetlands under its ill-fated migratory bird rule.[7] *Tabb Lakes*, 10 F.3d at 798. The order required Tabb Lakes to cease filling land without a permit from the Corps. Tabb Lakes filed a permit application, but after ten months of negotiations the parties were unable to reach an agreement on a plan to mitigate damages (such a plan is a requirement for issuance of a permit). *Id.* Tabb Lakes then withdrew its permit application and sued for a declaratory judgment that its property was not subject to the Corps' jurisdiction. The district court found for Tabb Lakes, holding that the assertion of jurisdiction by the Corps was procedurally defective because the migratory bird rule had not been promulgated pursuant to the notice and comment provisions of the Administrative Procedure Act ("APA"). *Id.* at 799. The Corps subsequently lost its appeal to the Fourth Circuit. *Id.* Tabb Lakes then filled the putative wetlands and constructed a residential subdivision. It also filed suit in the Court of Federal Claims alleging that the Corps' cease and desist order

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[7] The Supreme Court has rejected the interpretation of the Clean Water Act embodied in the migratory bird rule. *See Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001).

worked a temporary regulatory taking of the property on which the wetlands were located from the time the order issued until the date that the Fourth Circuit decision became final. *Id.*

The Court of Federal Claims rejected the takings claim, and we affirmed. We noted that while the cease and desist order did halt all development of the property, it was not necessarily a taking because "[a] taking by regulatory action is recognized only if such action goes 'too far.'" *Id.* at 800 (quoting *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)). Relying on *Riverside Bayview*, we held that the type of interference in *Tabb Lakes* did not go "too far" as a matter of law: "In this case the cease and desist order, while stopping the filling of wetlands, specifically left the door open to development by obtaining a permit. That type of regulatory action has been unequivocally held *not* to effect a taking." *Id.* at 800-01. Thus, we held that the Corps' cease and desist order did not give rise to a taking.

Boise's situation is indistinguishable from that of the landowner in *Tabb Lakes*. The sole difference between the two is that instead of an agency cease and desist order, Boise was subject to a court-ordered injunction. But this is a distinction without a difference. Like the *Tabb Lakes* plaintiffs, Boise was enjoined from a particular use of its property but was given an escape hatch: it could apply for a permit. We see no reason why the result in this case should differ from that in *Tabb Lakes*—no taking occurred because the government never denied the permit.

Boise attempts to distinguish *Tabb Lakes* by arguing that unlike the Clean Water Act, the ESA does not require permitting. Thus, it argues, absent the injunction, it could choose to log without an ITP. This distinguishes *Tabb Lakes*, says Boise, because "once the government obtained the injunction, obtaining an ITP became (even if feasible) a condition subsequent that could end the period during which

Boise's private land was, by government compulsion, already being devoted to public use." This argument does not distinguish *Tabb Lakes*, for absent the cease and desist order, the *Tabb Lakes* landowner also could have gone forward with filling its land without a permit. The cease and desist order (or, in this case, the injunction) was the point at which the agency first asserted regulatory jurisdiction over the landowner. Up to that point, no permit was required either in *Tabb Lakes* or here. To the extent Boise argues that the ESA did not give the district court the power to enjoin logging without a permit, its argument is not well taken. First, as discussed above, a takings claim before the Court of Federal Claims cannot ask that court to review the propriety of a district court's handling of a case. Second, as the Ninth Circuit has repeatedly held, the district court did have the authority to enjoin Boise from logging. *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir.1996) (holding that "[a] reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA"); *see also Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir.2000) (same). Because the district court had the power to permanently enjoin Boise from logging, it certainly had the power to enjoin it from logging without a permit. And even assuming *arguendo* that the district court did not possess the power to force Boise to apply for a permit if it wished to log, this still does not distinguish *Tabb Lakes*, for in that case the Corps' assertion of regulatory jurisdiction was determined to be invalid by both the district court and the Fourth Circuit. Thus, indulging in the assumption that the ESA did not give the district court the power to issue the injunction only makes this case more rather than less similar to the factual situation in *Tabb Lakes*.

As the government notes, we recently reaffirmed the vitality of *Tabb Lakes* in *Wyatt v. United States*, 271 F.3d 1090 (Fed.Cir.2001), and held that absent denial of the permit, only an extraordinary delay in the permitting process

can give rise to a compensable taking. In *Wyatt*, a mining company sued to recover compensation for a temporary taking of its mineral interests while its permit application was pending before the Office of Surface Mining Regulation and Enforcement ("OSM"). *Id.* at 1095. We began our analysis by reiterating the rule of *Riverside Bayview* that the mere imposition of a permit requirement does not take property under the Fifth Amendment. *Id.* at 1097-98. Furthermore, we noted that "mere 'fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership.'" *Id.* at 1098 (quoting *First English Evangelical Lutheran Church v. L.A. County, Calif.*, 482 U.S. 304, 320, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)). Citing *Tabb Lakes*, we held that only extraordinary delay in the permitting process can give rise to a taking if the permit has not been denied. *Id.* (noting that "it is true that a taking may occur by reason of 'extraordinary delay in governmental decisionmaking,'" but cautioning that "[b]ecause delay is inherent in complex regulatory schemes, we must examine the nature of the permitting process as well as the reasons for any delay," and noting that "it is the rare circumstance that we will find a taking based on extraordinary delay without a showing of bad faith" (quoting *Tabb Lakes*, 10 F.3d at 803)). We then analyzed the highly complex permitting process used by OSM, and held that under the circumstances no extraordinary delay occurred in the permitting process. *Id.* at 1099-100.

As noted above, Boise does not allege that the Service engaged in extraordinary delay in processing its permit. Therefore, under *Riverside Bayview*, *Tabb Lakes*, and *Wyatt*, we must reject Boise's regulatory takings claims because they are based on the mere imposition of a permitting requirement. Those cases make it perfectly clear that the imposition of such a requirement, without more, simply cannot give rise to a compensable taking. However, Boise contends that the Supreme Court's most recent statement on regulatory takings

jurisprudence, *Tahoe*, which unambiguously rejects the application of per se rules in the regulatory takings context, has undercut the *Riverside Bayview* line of cases and precludes the dismissal of its claims here. We disagree with Boise's reading of *Tahoe*.

In *Tahoe*, the Court rejected application of the per se rule articulated in *Lucas*[8] to temporary development moratoria. The *Tahoe* Court emphasized that, except in the rare situation before the Court in *Lucas* in which a plaintiff had been permanently deprived of all economic value associated with the property, whether a taking has occurred is governed by the ad hoc factual inquiry of *Penn Central*. The landowners in *Tahoe* advocated for a per se rule to compensate them for temporary development moratoria imposed on their land. In rejecting the landowners' proposed per se rules for temporary regulatory takings, the Court noted that it did "not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or another." *Tahoe*, 122 S.Ct. at 1486. The Court further stated that "[i]t is worth emphasizing that we do not reject a categorical rule in this case because a 32-month moratorium is just not that harsh. Instead, we reject a categorical rule because we conclude that the *Penn Central* framework adequately directs the inquiry to the proper considerations—only one of which is the length of the delay." *Id.* at 1487 n. 34. The Court explicitly analogized the temporary moratoria at issue in *Tahoe* to permitting delay cases:

> Petitioners fail to offer a persuasive explanation for why moratoria should be treated differently from ordinary permit delays. They contend that a permit applicant need

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[8] In *Lucas*, the Court held that a *per se* regulatory taking occurs when a regulation permanently destroys all economic value in the property. *Lucas*, 505 U.S. at 1019, 112 S.Ct. 2886.

> only comply with certain specific requirements in order to receive one and can expect to develop at the end of the process, whereas there is nothing the landowner subject to a moratorium can do but wait, with no guarantee that a permit will be granted at the end of the process. Setting aside the obvious problem with basing the distinction on a course of events we can only know after the fact—in the context of a facial challenge—petitioners' argument breaks down under close examination because there is no guarantee that a permit will be granted, or that a decision will be made within a year.

Tahoe, 122 S.Ct. at 1487 n. 31 (internal citation omitted). Boise argues that, due to the Court's explicit analogy between permitting delays and moratoria, *Tahoe* mandates that their regulatory takings claims be analyzed on the merits under *Penn Central* instead of dismissed as not ripe under *Riverside Bayview* and *Tabb Lakes*.

The Court in *Tahoe* did not confront a situation in which the delay alleged to be a taking arose only from a reasonable time taken to consider a permit application. Nor did the Court have to consider a case in which a takings claim is brought despite the fact that the permit was never denied or was actually granted.[9] The moratoria in *Tahoe* admitted of no exceptions; no permits or variances could be granted, and therefore the purported taking ripened immediately upon application of the moratoria to the property at issue. In contrast, in this case (as in *Tabb Lakes*, *Wyatt*, and *Riverside Bayview*), the permitting agency had not yet decided whether to grant the permit, and in fact in this case the Service actually lifted the permit requirement without ever having denied

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[9] The practical effect of the Service's decision to lift the permit requirement for logging the Walker Creek Unit was the same, of course, as if it had simply decided to grant Boise's permit.

Boise's permit application. Thus, the situation before the Court in *Tahoe* is very different from both the *Riverside Bayview* line of cases and the case we decide today:

The *Tahoe* Court did not explicitly overrule, or even discuss, the ripeness rule articulated in *Riverside Bayview*. Thus Boise argues, in essence, that the Court overruled *Riverside Bayview* sub silentio in footnote 31 of its opinion in *Tahoe*. Despite the narrowness of its holding, the Court in *Tahoe* provided an exceptionally thorough analysis of the landscape of takings law. It is worth noting that in its painstaking treatment of takings jurisprudence, the Court did not discuss ripeness at all, and did not explicitly overrule, limit, distinguish, or even mention *Riverside Bayview*. The rule that a taking does not ripen unless a permit is applied for and denied actually predates *Riverside Bayview*. *See Williamson County Reg'l Planning Comm'n*, 473 U.S. at 186, 105 S.Ct. 3108 (holding that "[a]s the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue"); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) (rejecting a Takings Clause challenge to the Surface Mining Control and Reclamation Act in part because the challengers had not yet availed themselves of administrative procedures for obtaining a variance from the requirements of the act and noting that "[t]he potential for such administrative solutions confirms the conclusion that the taking issue . . . simply is not ripe for judicial resolution"); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 927 (5th Cir.1983) (holding that takings claim does not ripen until a permit application is denied); *United States v. Byrd*, 609 F.2d 1204, 1211 (7th Cir.1979) (holding that no takings claim can arise unless a permit is denied). Furthermore, that rule has been consistently followed

not only by our court, but also by our sister circuits and the district courts. *E.g.*, *Adams v. United States*, 255 F.3d 787, 794-95 (9th Cir.2001) (following *Riverside Bayview* to reject argument that mere imposition of a permitting requirement, absent application for and denial of a permit, constitutes a taking); *Gilbert v. City of Cambridge*, 932 F.2d 51, 56 (1st Cir.1991) (same); *Rybachek v. United States Envtl. Prot. Agency*, 904 F.2d 1276, 1300 (9th Cir.1990) (same); *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir.1988) (holding takings claim not ripe under *Riverside Bayview* because landowner never applied for a permit); *United States v. Moseley*, 761 F.Supp. 90, 93 (E.D.Mo.1991) (following *Riverside Bayview* and holding takings claims unripe absent denial of a permit); *Lakewood Assoc. v. United States*, 45 Fed.Cl. 320, 332 (1999) (holding that application for and denial of a permit is necessary to a ripe takings claim absent futility or a showing that the permitting procedure is so burdensome as to effectively deprive the plaintiff of his property rights); *see also Moore v. United States*, 943 F.Supp. 603, 613-14 (E.D.Va.1996) (collecting cases). We think it unlikely that the Court meant, in footnote 31, to overrule by implication this well-settled ripeness jurisprudence, which includes three of its own prior cases (*Williamson, Hodel,* and *Riverside Bayview*).

Furthermore, we disagree with Boise's characterization of the meaning of footnote 31. In that footnote, the Court simply noted that for purposes of determining whether a taking has occurred, temporary moratoria should be treated like permitting delay cases. Thus, whether a taking occurred should be analyzed under *Penn Central*. This does not affect the longstanding rule that, absent denial of a permit, only extraordinary delays in the permitting process ripen into a compensable taking. Whether a particular extraordinary delay constitutes a taking is governed by *Penn Central*, just as are temporary moratoria.

Under this reading, of course, the Court's holding in *Tahoe* does not overrule *Riverside Bayview* and the cases that rely upon it—including *Tabb Lakes* and *Wyatt*—implicitly or otherwise. These authorities support, and indeed compel, dismissal of Boise's regulatory takings claims because they are based on nothing more than the bare assertion of regulatory jurisdiction by imposition of a permitting requirement. Boise makes no claim of delay in the permitting process. Thus, we affirm the trial court's dismissal of the regulatory takings claims.

C

Boise also argues that the district court's injunction worked a per se taking under the Supreme Court's decision in *Loretto* because (1) it was prevented from excluding spotted owls from its property; and (2) it was required to allow government agents to enter its property to conduct owl surveys. The trial court disagreed because it found that these two conditions "were incidents of the permitting process that were transitory in character, involved no continuous governmental presence at the site and imposed no additional burdens on the property beyond the temporary curtailment of logging inherent in the permitting process itself." *Boise*, slip op. at 8. We agree with the trial court that the nature of the intrusion complained of in this case does not make out a per se takings claim under *Loretto*.

The Court in *Loretto* held that a permanent physical occupation of property, no matter how slight, is a per se taking. *Loretto*, 458 U.S. at 441, 102 S.Ct. 3164. *Loretto* involved a New York statute that compelled landlords to allow cable companies to install boxes on their buildings. *Id.* at 423-24, 102 S.Ct. 3164. The question before the Court was whether the balancing test articulated in *Penn Central* should apply in such a situation. The Court rejected the application

of *Penn Central* and held that the compelled cable installation was subject to a traditional rule that all permanent physical invasions are takings. *Id.* at 438, 102 S.Ct. 3164.

The holding of *Loretto* is quite narrow. It applies only to permanent physical occupations either by the government or by a third party acting under government authority. The Court distinguished permanent physical occupations, in which it had always found a taking, from "cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within," which were not always takings. *Id.* at 428, 102 S.Ct. 3164. The Court noted that "[m]ore recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Id.* at 430, 102 S.Ct. 3164. The Court held that of the three, only a permanent physical occupation is a per se taking, and courts therefore need not engage in a balancing test when confronted with such a situation. *Id.* at 434-35, 102 S.Ct. 3164.

Physical invasions (as distinct from physical occupations) thus fall outside the *Loretto* rule. A physical occupation, as defined by the Court, is a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of the property. The Court defined the destruction of these interests as follows: (1) possession, "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space," *id.* at 435, 102 S.Ct. 3164; (2) use, "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property," *id.* at 436, 102 S.Ct. 3164; and (3) disposal, "even though the owner may retain the bare legal right to dispose of the occupied space . . . , the permanent occupation of that space . . . will ordinarily empty

the right of any value, since the purchaser will also be unable to make any use of the property," *id.* The Court carefully distinguished physical occupations (to which the *Loretto* rule applies) from temporary physical invasions of property by the government (to which the *Loretto* rule does not apply):

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. As *PruneYard Shopping Center v. Robins* [447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980)]; *Kaiser Aetna v. United States* [444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)], and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

Id. at 435 n. 12, 102 S.Ct. 3164 (internal citations omitted).

As noted above, Boise contends that the district court's injunction worked a per se taking under *Loretto* based on the taking of its so-called right to exclude owls by logging, and based on the requirement that it allow the Service to conduct owl surveys during the pendency of the preliminary injunction. We turn first to the alleged taking of an "owl easement" across Boise's property.

As an initial matter, Boise is incorrect to suppose that the district court's injunction was responsible for taking its right to exclude spotted owls. The ESA itself precludes Boise from harassing, harming, pursuing, wounding, or killing spotted owls, 16 U.S.C. §§ 1532(19), 1538(a)(1) (2000). Boise lost whatever right it had to "exclude" the owls nesting on its land when they were listed as a threatened species under the ESA. The injunction, therefore, did not take whatever remained of this putative property interest; it merely prevented Boise

from logging its land without a permit, which—as a regulation imposed upon Boise's use of the property—is a restriction on private use of the land and not a per se taking by the government.

We are not the first court to analyze the merits of this argument. Boise also sued the State of Oregon in state court for compensation based on the logging ban imposed by ODF while the mating pair of owls occupied the Walker Creek Unit. In its complaint, Boise "alleged that the administrative rules . . . required plaintiffs to maintain spotted owl nests and prevent their abandonment so the nests could be occupied annually by a pair of breeding owls and that the state's denial of plaintiff's plan to harvest the timber constituted a *per se* taking." *Boise Cascade Corp. v. State ex rel Oregon State Bd. of Forestry*, 164 Or.App. 114, 991 P.2d 563, 569 (1999). Although the Oregon court held that the regulatory takings claims should proceed to trial,[10] it rejected Boise's *Loretto* claim on the pleadings. *Id.* The court reasoned that

> [T]here are significant differences between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property. The state has no control over where spotted owls choose to nest. The natural occurrence of a pair of breeding spotted owls on a piece of property is more akin to the naturally occurring flood ... than to a flood caused by the government's construction of a dam, as was the case in *Pumpelly* [*v. Green Bay Co.*, 80 U.S. (13 Wall) 166, 20 L.Ed. 557 (1871)], or to the installation of an artificial structure such as a cable television box, as was the case in *Loretto*.

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[10] The ODF had actually rejected Boise's proposed timber harvest plan—its permit application—which gave rise to a ripe regulatory takings claim against the state.

> The state did not cause or induce the spotted owls to breed on plaintiff's property. The state simply regulated plaintiff's use of the property based on the presence of the spotted owls there. Although plaintiffs have stated a claim for a regulatory taking, they have not stated a claim for a "physical occupation" taking under *Loretto*.

Id. at 570.

We agree with the Oregon Court of Appeals that Boise's argument is merely an attempt to convert a regulatory takings claim, governed by *Penn Central* (and in this case barred by the ripeness doctrine of *Riverside Bayview* and *Tabb Lakes*) into a per se taking governed by the more generous rule of *Loretto*. Boise claims that application of *Loretto* is appropriate here because it views occupation by wild spotted owls as indistinguishable from a forced government intrusion upon its land. These two situations are, however, very different. The government has no control over where the spotted owls nest, and it did not force the owls to occupy Boise's land. The government simply imposed a temporary restriction on Boise's exploitation of certain natural resources located on its land unless Boise obtained a permit. As explained above, that the Service never denied Boise's permit—and in fact lifted the permit requirement—is fatal to Boise's regulatory takings claims, and it remains fatal notwithstanding Boise's attempt to recharacterize those claims as a forced physical occupation by owls.

Boise also claims a per se taking based on the requirement that it allow government officials to enter its land to conduct owl surveys. This particular requirement was only part of the preliminary injunction and was therefore in effect from April 1, 1998, until August 31, 1998—five months. Specifically, the court granted the government's motion for a preliminary injunction prohibiting logging "until this litigation concludes and for permission to survey for spotted owls

until August 31, 1998." The permanent injunction did not authorize the government to enter Boise's land without Boise's permission.

Under a plain reading of *Loretto*, Boise cannot claim that the government's brief intrusions onto its land to conduct owl surveys constitute a per se taking. Transient, nonexclusive entries by the Service to conduct owl surveys do not permanently usurp Boise's exclusive right to possess, use, and dispose of its property. The government's incursion into Boise's property is more in the nature of a temporary trespass—though, obviously, sanctioned by the district court and therefore not unlawful—rather than a permanent physical occupation or an easement of some kind.

However, Boise contends that in *Hendler v. United States*, 952 F.2d 1364 (Fed.Cir.1991), we interpreted *Loretto* very broadly to include temporary incursions like those at issue here. In *Hendler*, the plaintiff landowners sued in the Court of Federal Claims for compensation after the government, acting under the EPA's authority granted by CERCLA,[11] sunk concrete wells on their property to monitor groundwater pollution from a nearby superfund site. *Id.* at 1367. The trial court dismissed the landowners' takings claims, and we reversed. We held that the wells, and the government workers who entered to install, maintain, and monitor them permanently occupied the plaintiffs' land and therefore gave rise to a per se taking under *Loretto*. *Id.* at 1377. Our decision in *Hendler* rested squarely upon the permanent nature of the wells and the regular government intrusions to monitor them. We noted that

> [t]here is nothing "temporary" about the wells the Government installed on plaintiffs' property. . . . Years have passed since the government installed the first

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[11]The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-57 (1994).

> wells. The wells are some 100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement. Each well was capped with a cement casing lined with reinforcing steel bars, and enclosed by a railing of steel pipe set in cement. These surveillance wells are at least as "permanent" in this sense as the CATV equipment in *Loretto*.

Id. at 1376. The permanency of the wells and the quasi-permanent right of entry provided to the government workers who monitored and maintained them led us to apply the per se takings theory of *Loretto*.

The government intrusion complained of in this case was of far lesser duration than that in *Hendler*, and it did not involve the placement of a permanent or even a quasi-permanent installation on Boise's property. In *Hendler*, the government entered the land and placed upon it what were essentially permanent wells—wells that it intended to actively monitor over the years. Here, in contrast, the Service briefly entered the land over a period of five months in order to conduct owl surveys needed for the resolution of a lawsuit initiated by Boise. The Service was not authorized to make, and did not make, any permanent incursion on Boise's land. Boise does not argue that the surveyors added any kind of permanent (or even temporary) addition to the landscape of the Walker Creek Unit. Boise nevertheless contends that the Service's intrusion satisfies the definition of "permanent" given in *Hendler*, and that the *Loretto* per se rule therefore applies.

Boise's argument rests on a portion of *Hendler* in which the court, discussing *Loretto*'s permanency requirement, noted that "[i]n this context, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term—what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute." *Id.*

Boise's argument based on this dicta in *Hendler* is not novel. The language quoted above has been widely misunderstood and criticized as abrogating the permanency requirement established by the Supreme Court in *Loretto*.[12]

Obviously this court is without power to abrogate the law established by the Supreme Court, and *Hendler* does not purport to do so. Language such as this must be read in context. And in context, it is clear that the court merely meant to focus attention on the *character* of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration. Thus, *Hendler*'s statement regarding permanency was followed by three illustrative examples, drawn from prior Supreme Court cases, of per se takings due to complete physical occupations of estates of lesser temporal duration than a fee simple absolute. In two of those cases, *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945), and *United States v.*

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[12] In *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Authority*, 983 F.Supp. 319, 327 (N.D.N.Y.1997), for instance, a district court called upon to apply *Loretto* to "strikingly similar" facts as those of *Hendler* noted that "[s]emantics aside, what the *Hendler* court has done, in essence, is to completely emasculate *Loretto*'s requirement of permanency." The court also opined that "[t]he Hendler court's creative use of language calls to mind Lewis Carroll's famous passage:

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."

Id. at 327 n. 7 (quoting Lewis Carroll, *Through the Looking Glass* 163). *See also* David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 Envtl. L. 821, 832 (1999) (describing *Hendler* as "seriously flawed" and "problematic substantively, in part at least for the mechanistic way it extends categorical analysis to conclude that a permanent physical occupation, and therefore a taking, had occurred, without really requiring that the taking be permanent").

Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946), the government acquired the remainder of a leasehold interest through a judicial condemnation proceeding. In the third, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), the United States acquired, via condemnation, a laundry plant for a term of years (renewable at the discretion of the Secretary of War) during World War II. The property owner in *Kimball* was completely displaced, and his business was run by the Quartermaster Corps as a laundry service for the Seventh Service Command. *Id.* at 3, 69 S.Ct. 1434. In none of these cases did the government permanently (in a temporal sense) occupy the property. Nevertheless, they involved total occupation of the property by the government, and therefore all three cases were per se takings where the only dispute concerned the amount of compensation to be paid to the displaced owner.

Putting its dicta to one side, *Hendler*'s holding was unremarkable and quite narrow: it merely held that when the government enters private land, sinks 100-foot deep steel reinforced wells surrounded by gravel and concrete, and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years, a per se taking under *Loretto* has occurred. The facts of *Hendler* were well within the limited parameters of the per se rule delineated by the *Loretto* Court for, as we stated in *Hendler*, the "wells are at least as 'permanent' . . . as the CATV equipment in *Loretto*." *Hendler*, 952 F.2d at 1376. Thus, Boise is incorrect to suppose that *Hendler* compels us to turn a transient invasion by owl surveyors into a per se taking under *Loretto*. Like the trial court, we hold that the extremely limited and transient nature of the intrusion in this case, coupled with its purpose, which was to discover information necessary to the adjudication of a case that Boise itself initiated, preclude a finding that a taking occurred as a matter of law.

III

For the reasons given above, we conclude that Boise cannot make out a ripe takings claim based on the mere imposition of a permitting requirement, and that it has not alleged facts sufficient to support a per se takings claim under *Loretto* as a matter of law. We therefore affirm the judgment of the Court of Federal Claims in its entirety.

COSTS

No costs.

AFFIRMED

Supreme Court, U.S.
FILED
FEB 7 2003
CLERK

(3)

No. 02-862

In the Supreme Court of the United States

BOISE CASCADE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court injunction that required petitioner to obtain a permit before harvesting timber on its property constituted a taking under the Fifth Amendment.

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In the Supreme Court of the United States

No. 02-862

BOISE CASCADE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App. sa1-sa30) is reported at 296 F.3d 1339. The opinion of the Court of Federal Claims (Pet. App. 2a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2002. A petition for rehearing was denied on September 3, 2002 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish or wildlife determined to be endangered or threatened. Administration of the ESA is divided between the Secretaries of the Interior (through the Fish and Wildlife Service (FWS)) and of Commerce (through the National Marine Fisheries Service), depending upon the species involved. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b).

The ESA authorizes the appropriate Secretary to list a domestic or foreign species as endangered or threatened. 16 U.S.C. 1533(a).[1] Section 9(a)(1)(B) of the Act, 16 U.S.C. 1538(a)(1)(B), provides that it is generally unlawful to "take" any endangered species within the United States. The ESA defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). The term "harm" is defined by Interior Department regulations to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. 17.3; see 50 C.F.R. 222.102 (Commerce Department definition of "harm"); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995) (upholding Interior Department regulation defining "harm" for purposes of "take" prohibition). For species under her

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[1] An endangered species is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A threatened species is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. 1532(20).

jurisdiction, the Secretary of the Interior has generally extended Section 9's take prohibition to cover threatened as well as endangered species. 50 C.F.R. 17.31(a). The ESA establishes both civil and criminal penalties for violations of Section 9 and implementing regulations. 16 U.S.C. 1540.

Under Section 10(a)(1)(B) of the ESA, the Secretary may permit the "take" of a listed species "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B). The applicant for an Incidental Take Permit (ITP) under Section 10 must submit a conservation plan describing the impact of the take, steps the applicant will take to minimize and mitigate those impacts, and alternatives the applicant has considered. 16 U.S.C. 1539(a)(2)(A); 50 C.F.R. 17.22(b)(1), 222.307(b)(5). Upon receipt of a complete application, the Secretary publishes notice of the application in the *Federal Register*. 50 C.F.R. 17.22, 222.303(b). The Secretary may issue an ITP if she finds that the taking will be incidental and "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild," and that the applicant will minimize and mitigate the impacts on the species "to the maximum extent practicable" and will implement any other terms and conditions the Secretary deems necessary and appropriate. 16 U.S.C. 1539(a)(2)(B); 50 C.F.R. 17.22(b)(2), 222.307(c)(2). The take of any listed species in compliance with the terms of an ITP does not violate Section 9 of the ESA. See 16 U.S.C. 1538(a)(1).

2. Petitioner Boise Cascade Corporation owns a tract of timberland of approximately 65 acres, known as the Walker Creek Unit, located in Clatsop County,

Oregon. Pet. 5; C.A. App. 14.[2] A pair of northern spotted owls, a federally listed threatened species, nested on the site from 1990 to 1996. C.A. App. 14. In order to protect the spotted owl nesting site, the Oregon Department of Forestry prohibited logging in an area that included the Walker Creek Unit. *Ibid.*

In October 1997, the State of Oregon notified petitioner that because the owls had not occupied the nesting site during the 1997 nesting season—the female owl had died and the male owl had moved to a nesting site outside the Walker Creek Unit—the State considered the owls to have abandoned the site. C.A. App. 14, 196. Petitioner then submitted a plan to harvest the timber on the Walker Creek Unit. *Id.* at 14-15. The State approved the plan but advised petitioner that it should consult with the FWS before it commenced logging operations. *Id.* at 15.

After inspecting the site, the FWS informed petitioner that the Walker Creek Unit "contain[ed] nesting habitat as well as foraging or dispersal habitat for spotted owls" and that logging would "create a risk of harm to the northern spotted owls which would use this site." C.A. App. 15, 211. The FWS suggested that if petitioner "desire[d] certainty in this matter," it could file an application for an ITP or pursue a land exchange with the State. *Id.* at 211. Instead of applying for an ITP, petitioner filed suit against the FWS in federal district court, seeking a declaration that logging on the Walker Creek Unit would not "take" spotted owls within the meaning of the ESA, and an injunction prohibiting the FWS from taking any action to prevent the

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[2] Petitioner's complaint identified "50 acres of merchantable timber," C.A. App. 14, but apparently the tract is somewhat larger. See Pet. 5; Pet. Supp. App. sa1.

logging. Pet. App. 19a-24a. The United States filed a counterclaim to enjoin petitioner from logging on the Walker Creek Unit without an ITP. C.A. App. 15.

On April 1, 1998, the district court dismissed petitioner's complaint and preliminarily enjoined it from logging during the pendency of the litigation. C.A. App. 102-119. The court explained that, under the applicable regulations, "significant habitat modification—such as [petitioner's] proposed logging—can constitute a taking of an endangered or threatened species even if no members of that species are immediately present." *Id.* at 116. The court found that preliminary injunctive relief was appropriate "[b]ecause [petitioner's] own witnesses have testified to facts that indicate that irreparable harm is imminent and that a taking of spotted owls in violation of the ESA is likely to occur." *Id.* at 118. The court permitted the FWS to survey the Walker Creek Unit for spotted owls, and it required the parties to report to the court by September 4, 1998, on the results of the surveys, as well as on the parties' positions regarding whether logging would violate the ESA and whether petitioner could obtain an ITP. *Id.* at 16, 105, 118-119. Petitioner did not appeal.[3]

During the 1998 nesting season, a subadult spotted owl was found to have been in the area of the Walker Creek Unit. C.A. App. 134. On October 15, 1998, the

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[3] On June 28, 1998, petitioner filed suit in the Court of Federal Claims (CFC), alleging a Fifth Amendment permanent taking of the Walker Creek Unit resulting from the district court's injunction. See C.A. App. 134. The United States argued that the takings claim was not ripe because petitioner had not sought a permit from the FWS. *Ibid.* On November 13, 1998, the CFC entered a voluntary dismissal of petitioner's complaint without prejudice in order to facilitate petitioner's pursuit of available administrative remedies. *Ibid.*

district court permanently enjoined petitioner from "taking any northern spotted owls by the logging of any further timber in its Walker Creek Unit without a permit issued pursuant to Section 10 of the ESA." Pet. App. 36a. Petitioner again did not appeal.

On November 6, 1998, petitioner submitted an application for an ITP under Section 10 of the ESA. C.A. App. 16, 134. On December 10, 1998, while the FWS was evaluating the completeness of the ITP application, petitioner filed a mandamus action to require the FWS to publish notice of the application in the *Federal Register*. *Id.* at 132-135. On December 23, 1998, the FWS published notice of that application. *Id.* at 16. On February 5, 1999, the district court ordered the FWS to act on petitioner's permit application by September 1, 1999. *Id.* at 16-17, 157.

By letters dated July 30, 1999, the FWS notified petitioner that it no longer needed an ITP to conduct logging on the Walker Creek Unit tract. C.A. App. 159, 212. The subadult spotted owl that had previously been detected in the vicinity of the Walker Creek Unit was found dead on May 17, 1999, and subsequent surveys detected no spotted owls. *Id.* at 212. Accordingly, the FWS concluded that "no spotted owls would be taken by [petitioner's] planned harvest of the property" and that a permit was therefore no longer required. *Id.* at 159, 212. On August 17, 1999, the district court dissolved the injunction that it had previously entered against logging without a permit on the Walker Creek unit. *Id.* at 17.

3. On October 6, 1999, petitioner filed the instant suit in the Court of Federal Claims (CFC), seeking "just compensation for the temporary taking of merchantable timber, which it was prevented from logging as the result of an injunction obtained by the govern-

ment." C.A. App. 13. Petitioner's complaint set forth four claims. First, the complaint alleged that the district court injunction had imposed a temporary servitude upon petitioner's property by "requiring [petitioner's] merchantable timber to be left standing so it could be occupied as a northern spotted owl nesting site," and by "requir[ing] [petitioner] to allow government personnel to come onto [petitioner's] property for the purpose of determining if northern spotted owls were present." *Id.* at 17. Petitioner alleged that the injunction thereby effected a per se taking under this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and it sought just compensation in the amount of $295,012. C.A. App. 17. Second, the complaint alleged that by temporarily depriving petitioner of all economically productive use of its timber, the injunction constituted a per se taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). C.A. App. 17-18. Third, the complaint alleged that "[p]rotecting habitat where there are no identifiable owls present to be harmed and where that habitat has not been designated critical to the survival of the species, does not advance a legitimate governmental interest under the ESA," and that the injunction therefore constituted a taking under *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). C.A. App. 19. Fourth, the complaint alleged that petitioner had a reasonable investment-backed expectation that it would be able to harvest the timber on the Walker Creek Unit and that, by prohibiting logging, the injunction worked a temporary taking under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). C.A. App. 20.

The CFC granted the government's motion to dismiss the complaint. Pet. App. 2a-11a. The court in-

voked the "settled principle in takings law that a regulatory process that requires a property owner to obtain a permit before proceeding with a particular use of his or her property does not, in itself, effect a taking of the property." *Id.* at 8a. Rather, the court explained, "[o]nly when a permit is denied and the effect of the denial is to prevent economically viable use of the land in question can it be said that a taking has occurred." *Ibid.* (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) (internal quotation marks omitted)). The court concluded that "the permit process was an obligatory component of the Endangered Species Act on which no claim of taking may be based. A permit process that only temporarily curtails the use of private property cannot fairly be characterized as the appropriation of private property to public use." *Id.* at 10a-11a. The CFC also rejected petitioner's contention that the district court injunction had effected a "physical taking" by requiring petitioner to admit government personnel to the land and by forbidding petitioner to oust the northern spotted owl. *Id.* at 11a. The court explained that those "incidents of the permitting process * * * were transitory in character, involved no continuous governmental presence at the site and imposed no additional burdens on the property beyond the temporary curtailment of logging inherent in the permitting process itself." *Ibid.*

4. The court of appeals affirmed. Pet. Supp. App. sa1-sa30.

a. The court of appeals held that petitioner's regulatory takings claims lacked merit because the effect of the district court's injunction was simply that no logging on the Walker Creek Unit tract could take place without a permit. Pet. Supp. App. sa9-sa21. The court explained that, under the precedents of this Court and

the Federal Circuit, "the imposition of such a requirement, without more, simply cannot give rise to a compensable taking." *Id.* at sa16. The court relied on the "longstanding rule" that, unless and until a permit application is actually denied, "only extraordinary delays in the permitting process ripen into a compensable taking." *Id.* at sa20. Because petitioner had made "no claim of delay in the permitting process," the court of appeals "affirm[ed] the [CFC's] dismissal of the regulatory takings claims." *Id.* at sa21.

b. Petitioner also contended that "the district court's injunction worked a per se taking under [this] Court's decision in *Loretto* because (1) [petitioner] was prevented from excluding spotted owls from its property; and (2) [petitioner] was required to allow government agents to enter its property to conduct owl surveys." Pet. Supp. App. sa21. The court of appeals rejected that claim. *Id.* at sa21-sa29. The court observed that "[t]he holding of *Loretto* is quite narrow" and "applies only to permanent physical occupations either by the government or by a third party acting under government authority." *Id.* at sa22.

With respect to "the alleged taking of an 'owl easement' across [petitioner's] property," the court stated that the district court injunction did not deprive petitioner of any pre-existing right to exclude the birds because "[t]he ESA itself precludes [petitioner] from harassing, harming, pursuing, wounding, or killing spotted owls. [Petitioner] lost whatever right it had to 'exclude' the owls nesting on its land when they were listed as a threatened species under the ESA." Pet. Supp. App. sa23 (citations omitted). The court also observed that the temporary ban on logging could not properly be characterized as a "forced government intrusion" upon petitioner's land because "[t]he govern-

ment has no control over where the spotted owls nest, and it did not force the owls to occupy [petitioner's] land. The government simply imposed a temporary restriction on [petitioner's] exploitation of certain natural resources located on its land unless [petitioner] obtained a permit." *Id.* at sa25.

The court of appeals similarly rejected petitioner's claim of "a per se taking based on the requirement that it allow government officials to enter its land to conduct owl surveys." Pet. Supp. App. sa25. The court observed that "[t]ransient, nonexclusive entries by the [FWS] to conduct owl surveys do not permanently usurp [petitioner's] exclusive right to possess, use, and dispose of its property." *Id.* at sa26. It concluded that "the extremely limited and transient nature of the intrusion in this case, coupled with its purpose, which was to discover information necessary to the adjudication of a case that [petitioner] itself initiated, preclude a finding that a taking occurred as a matter of law." *Id.* at sa29.

ARGUMENT

Petitioner contends that it suffered a physical occupation of its property, and thus a per se taking under this Court's decision in *Loretto*, on the theory that "the FWS both claimed the right to use Petitioner's property for a spotted owl nesting habitat, and prevented Petitioner from engaging in any action to exclude the owls from its property." Pet. 11. Petitioner also suggests (see Pet. 10, 19, 22) that the district court effected a physical taking by authorizing FWS personnel to

enter the Walker Creek Unit.[4] Petitioner's claims lack merit and do not warrant this Court's review.

As the court of appeals recognized, "[t]he holding of *Loretto* is quite narrow. It applies only to permanent physical occupations either by the government or by a third party acting under government authority." Pet. Supp. App. sa22. The timber harvesting restrictions of which petitioner complains were temporary rather than permanent, and they did not effect a "physical occupation" of petitioner's land. Nor do this Court's decisions suggest that every entry of government officials onto private property constitutes a per se physical taking.[5]

1. A requirement that real property be left undisturbed until the issuance of a government permit is a common feature of land-use regulation. In *Riverside Bayview*, this Court considered and rejected the suggestion that such requirements effect a Fifth Amendment taking. The Court explained:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent

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[4] Petitioner does not press in this Court its prior claim, rejected by the court of appeals (see Pet. Supp. App. sa9-sa21), that the district court injunction effected a regulatory taking of its property.

[5] On January 13, 2003, this Court denied the petition for a writ of certiorari in *Seiber* v. *Oregon*, No. 02-348, which presented a substantially similar question.

> "economically viable" use of the land in question can it be said that a taking has occurred.

474 U.S. at 127. In *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1485 (2002), this Court reaffirmed that the normal delays associated with land-use permitting processes should not be treated as per se takings.

In the present case, neither the ESA itself nor the district court injunction foreclosed the possibility that timber could be harvested on petitioner's land. The Act makes clear that land-use activities may proceed, even when their incidental effect is to "take" members of an endangered species, so long as the landowner has obtained an ITP. The district court required the FWS to rule on petitioner's ITP application by a date certain, and the FWS determined before that date that an ITP was unnecessary, leaving petitioner free to harvest the timber on its land. That determination was made less than nine months after petitioner submitted its ITP application. Petitioner has made "no claim of delay in the permitting process," Pet. Supp. App. sa21, nor has it attempted in this Court to demonstrate a taking under the multi-factor analysis of *Penn Central*. This Court's decisions in *Riverside Bayview* and *Tahoe-Sierra* therefore foreclose petitioner's takings claim.

2. In *Loretto*, this Court held that a "permanent physical occupation" of real property constitutes a per se Fifth Amendment taking. 458 U.S. at 426-435. The Court applied that rule to a state-law requirement that the owner of an apartment building permit the installation of cable television equipment on the building's roof. *Id.* at 438-440. The Court has also held that a "permanent physical occupation" of real property occurs when members of the public "are given a permanent and con-

tinuous right to pass to and fro, so that the real property may continuously be traversed." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 832 (1987).

Nothing in this Court's decisions suggests that a prohibition on timber harvesting should be regarded for takings purposes as a "physical occupation," either by the trees themselves or by the wildlife whose habitat is protected. As the court of appeals explained, "[t]he government has no control over where the spotted owls nest, and it did not force the owls to occupy [petitioner's] land. The government simply imposed a temporary restriction on [petitioner's] exploitation of certain natural resources located on its land unless [petitioner] obtained a permit." Pet. Supp. App. sa25. Petitioner's theory would obliterate the distinction, central to this Court's Just Compensation Clause jurisprudence, between physical and regulatory takings. Under petitioner's theory, restrictions on a broad range of ground-disturbing activities (*e.g.*, logging, mining, filling of wetlands) could be recharacterized as "physical occupations" of the land by its existing physical features.

Land-use restrictions that deprive a parcel of all economic value may effect a taking under this Court's decision in *Lucas*. And even where the economic consequences of land-use regulation are less severe, the property owner may be able to establish a taking under the multi-factor analysis described in *Penn Central*. The government does not cause a per se taking under *Loretto*, however, simply by prohibiting the destruction or alteration of some pre-existing physical feature of the land.

3. Petitioner contends (Pet. 20) that "[t]here is a split among the lower courts in cases involving wildlife over whether a property owner can sustain a claim

based on a physical taking theory." Contrary to petitioner's suggestion, the cases upon which petitioner relies do not conflict with the court of appeals' decision.

In *Southview Associates, Ltd.* v. *Bongartz*, 980 F.2d 84 (1992), cert. denied, 507 U.S. 987 (1993), the Second Circuit rejected a claim similar to the one petitioner advances here. The plaintiff there claimed that the denial of a permit to construct a residential subdivision based on harm to necessary deer habitat constituted a per se taking under *Loretto*. *Id.* at 92-93. The court of appeals provided a detailed analysis of that claim and ultimately concluded that the permit denial "represent[ed] a regulation of the use of Southview's property, rather than a *per se* physical taking." *Id.* at 95. That holding is fully consistent with the court of appeals' decision in this case.

Bailey v. *Holland*, 126 F.2d 317 (4th Cir. 1942), did not involve a physical taking claim at all. The plaintiff there sued to enjoin enforcement of a regulation prohibiting hunting of migratory water fowl on lands adjacent to a federally owned refuge. *Id.* at 319. The plaintiff contended, *inter alia*, that the hunting ban constituted a regulatory taking. *Id.* at 324. The Fourth Circuit rejected that claim. *Ibid.*

Wisconsin v. *Herwig*, 117 N.W.2d 335 (Wis. 1962), involved a criminal prosecution for violation of a rule prohibiting hunting in an area of privately owned land. The defendant had a valid hunting license, but was nonetheless charged with hunting on his own land because it was designated a closed area. The court affirmed the defendant's acquittal, finding that the hunting ban worked a regulatory taking of his property under the state constitution. *Id.* at 340. The court did not discuss the proper treatment of per se physical invasions under the Fifth Amendment, and the case did

not involve temporary restrictions on particular uses of property during permitting procedures.

In *Shellnut* v. *Arkansas State Game & Fish Commission*, 258 S.W.2d 570 (Ark. 1953), the Supreme Court of Arkansas struck down a state regulation that prohibited hunting on lands surrounded by state wildlife refuges. The plaintiffs brought suit to enjoin enforcement of the regulation on the ground that it materially reduced the value of their lands by precluding them from preventing damage to their crops caused by deer. *Id.* at 573. Like the Wisconsin Supreme Court's decision in *Herwig*, the Arkansas Supreme Court's decision was based on the state rather than the federal constitution, see *id.* at 573-574, and it predates this Court's modern takings jurisprudence. Nor did that case involve temporary land-use restrictions imposed during the pendency of a permit application process. Petitioner has therefore identified no conflict in authority warranting this Court's review.

4. Petitioner suggests in passing (see Pet. 10, 19, 22) that the district court injunction effected a per se physical taking by authorizing FWS officials to enter and inspect petitioner's tract. That claim lacks merit. Although a per se taking may occur when members of the public "are given a *permanent and continuous* right to pass to and fro" along private property, *Nollan*, 483 U.S. at 832 (emphasis added), this Court has not suggested that the government must pay compensation whenever its officials enter privately owned land to monitor compliance with applicable legal requirements. To the contrary, the Court in *Loretto* emphasized the constitutional distinction between "cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, * * * on the other." 458 U.S. at 428; see *id.* at 428-435; cf. *New*

York v. *Burger*, 482 U.S. 691, 699-701 (1987) (discussing circumstances under which warrantless searches of commercial property will be deemed reasonable under the Fourth Amendment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware Corporation

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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QUESTION PRESENTED

Where the government admittedly deprives an owner of the right to exclude third parties from his land, may the government evade liability for a physical taking merely because it did not "cause" or "induce" or "force" the subsequent occupation or exercise "control" over the occupier?

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INTEREST OF AMICUS CURIAE

For three decades, amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Finally, PLF has participated as amicus curiae in nearly every major real property takings case, and numerous other takings cases, heard by this Court in the past two decades.[1]

SUMMARY OF ARGUMENT

Petitioner Boise Cascade alleged—and the court below expressly acknowledged—that Boise lost the right to exclude spotted owls from its property as a result of the government's enforcement of regulations promulgated under the Endangered Species Act (ESA). Nonetheless, the Court of Appeals for the Federal Circuit rejected Boise's physical takings claim on the ground that the government could not be liable for a taking by permanent physical occupation if it did not "cause" or "induce" or "force" the occupation and exercised no "control" over the occupier. In so deciding, the lower court resolved an important question of federal takings law in a way that conflicts with this

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Court's takings jurisprudence and with the decisions of other lower courts.

First, this Court's decisions make clear that the government effects a physical taking whenever it requires a property owner to submit to the physical occupation of his land or (to say the same thing) whenever it deprives the owner of the right to exclude strangers. Under either formulation, it is *required acquiescence* that is the touchstone of a compensable physical occupation. This Court's decisions further make clear that the government cannot evade takings liability merely because the instrument of the required occupation was not the government itself but rather a third party. In none of these decisions did the Court make the government's "causing or inducing" (let alone "forcing") the third-party occupation a prerequisite to liability, nor did the Court require that the government exercise some "control" over the third-party occupier. Indeed, in each of the cases, the government was liable for a physical taking despite having merely "permitted" the occupation, which resulted from the independent choice of a third party.

Second, lower courts have applied this Court's physical takings jurisprudence in a manner that conflicts with the decision below. These courts have found that physical takings are (or would be) effected by two federal regulatory schemes that require property owners to acquiesce in physical occupations by their competitors. Under neither of these schemes could the government be said to "cause or induce" (or "force") the occupations or to "control" the occupiers, and no court made such causation, inducement, or control a prerequisite to the finding of physical taking. Moreover, the courts rejected the argument that a required acquiescence in a physical occupation could be justified as merely a "permissible regulation of the *use* of real property."

ARGUMENT

IN RULING THAT GOVERNMENT DOES NOT EFFECT A PHYSICAL TAKING IN DEPRIVING AN OWNER OF THE RIGHT TO EXCLUDE THIRD PARTIES, THE LOWER COURT DEPARTED FROM THIS COURT'S DECISIONS AND EXACERBATED A CONFLICT AMONG THE LOWER COURTS

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court identified "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." The first instance of what are called "categorical" takings "encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* As to such physical invasions—also called physical "occupations"—the law is that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* As set forth below, Boise Cascade suffered this kind of categorical taking when the government forced it to submit to the physical occupation of its timberland by spotted owls. In determining otherwise, the Federal Circuit court rejected this Court's physical takings jurisprudence and exacerbated a split in the lower courts on an important question of takings law.

A. The Issue and the Lower Court's Ruling

In its most recent consideration of categorical takings by physical occupation, this Court explained that the government effects a physical taking whenever "it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992). To rephrase the point, a physical taking occurs whenever the government deprives a property owner of his "right to exclude," a right that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 528 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). In either

formulation, it is the "element of required acquiescence [that] is at the heart of the concept of occupation." *Id.* at 527 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)). Indeed, the Court recently noted the obvious point that this required acquiescence is often effected by means of *regulation*: where "regulations . . . require the [property owner] to suffer the physical occupation of a portion of his building," they will be analyzed not as regulatory takings but rather as physical takings. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1479 n.18 (2002) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

In the present case, Boise Cascade alleged, among other things, that it "was prevented from excluding spotted owls from its property." 296 F.3d 1339, 1352 (Fed. Cir. 2002). On this point, the lower court essentially agreed with petitioner: "The ESA itself precludes Boise from harassing, harming, pursuing, wounding, or killing spotted owls. Boise lost whatever right it had to 'exclude' the owls nesting on its land when they were listed as a threatened species under the ESA." *Id.* at 1354 (citation omitted and citing 16 U.S.C. §§ 1532(19), 1538(a)(1)).[2] To frame Boise's allegation in the terms used in the foregoing precedents, the ESA, as enforced by the Oregon district court's injunction, deprived petitioner of the right to exclude the owls

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[2] The Federal Circuit apparently found it significant that the ESA itself, as opposed to the district court's injunction, "was responsible for taking [Boise's] right to exclude spotted owls." *Id.* This distinction is irrelevant for present purposes, however. Boise's takings claim is not asserted against the district court, nor even against the statute itself, but rather against the United States Government. The precise division of causative responsibility among the federal statute, the federal regulations, the federal administrative agency, and the federal district court has no bearing on whether there has been "*governmental* interference with property rights . . . amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis added).

from its property and instead required petitioner to acquiesce in the owls' presence on its land. In so alleging, Boise Cascade successfully stated a claim for a categorical taking by physical occupation under this Court's takings jurisprudence.

Even as it acknowledged that "Boise lost whatever right it had to 'exclude' the owls nesting on its land," the court below rejected Boise Cascade's physical takings claim. It did so for essentially three reasons. First, the rule that physical occupations are categorical, compensable takings "applies only to permanent physical occupations either by *the government* or by a third party *acting under government authority*" *Id.* at 1353 (emphasis added). Second, Boise did not suffer a compensable physical taking because the government "did not cause or induce the spotted owls to breed on [Boise's] property"; rather, the government "simply regulated [Boise's] use of the property based on the presence of the spotted owls there." *Id.* at 1354 (quoting *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 991 P.2d 563, 570 (Or. Ct. App. 1999) (hereafter *Board of Forestry*), *cert. denied*, 532 U.S. 923 (2001). Third, there was no physical taking because the government "has no control over where the spotted owls nest, and it did not force the owls to occupy Boise's land." *Id.* at 1354-55.

As set forth below, this reasoning is flawed: the decisions of this Court demonstrate that the lower court erred in holding that a taking cannot occur unless the third-party occupier was "acting under government authority," unless the government "caused or induced" occupation, and unless it had "control" over the occupier or otherwise "forced" the occupation. More to the point perhaps, the decision below is in conflict with the decisions of many other lower courts.

B. The Conflict with This Court

In *Kaiser Aetna*, the property owners converted a privately owned lagoon into a marina, thereby connecting the lagoon to a publicly owned bay; subsequently, the United States sought

"an injunction to require [the owners] to allow public access" to the waters of the marina on the ground that it had become subject to the federal "navigational servitude." 444 U.S. at 169. Having ruled that "Congress could assure the public a free right of access to the [waters of the marina] if it so chose," *id.* at 174, this Court went on to consider whether Congress could do so "without invoking its eminent domain power and paying just compensation," *id.* at 180. The Court emphatically ruled that Congress could ***not***, because "the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina." *Id.* (emphasis added). But just who would actually be doing the "invading"? Not the government, of course, but members of the boating "public" based on their own independent choices. To use the Federal Circuit's terms, the public was not "acting under government authority" (any more than any person acts under government authority when he enters a public place), nor did the government "cause or induce" (let alone "force") anyone to sail into the marina; to the contrary, the government "ha[d] no control over where" public boaters chose to navigate their boats. 296 F.3d at 1353-55. In other words, it was no preclusion to this Court's finding a physical taking in *Kaiser Aetna* that members of the boating public were not placed or induced onto or into the waters of the private marina by the government.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), is similar in essential regards. In that case, "New York law provide[d] that a landlord must permit a cable television company to install its cable facilities upon his property." *Id.* at 421. This Court concluded that "such a physical occupation of property is a taking." *Id.* Yet again, it was not the *government* (or its agents) that occupied the landlord's property; rather, the occupier was a privately owned cable television company acting on its own behest. Indeed, the Court characterized the case as one in which the government's regulations "require[d] the landlord to suffer the physical occupation of a portion of his building *by a third party*." *Id.* at 440 (emphasis

added); *accord Florida Power Corp.*, 480 U.S. at 252 (quoting same); *Tahoe-Sierra*, 122 S. Ct. at 1479 n.18 (quoting same). As relevant to the present case, it is crucial to recognize that the New York City government did not "cause or induce" (never mind "force") the cable company to occupy the property of the landlord. No, the government merely "permit[ted]" the occupation, *Loretto*, 458 U.S. at 421, and then it "simply regulated [the landlord's] use of the property based on the presence of the [cable facilities] there," 296 F.3d at 1354 (quoting *Board of Forestry*, 991 P.2d at 570)—that is, prohibiting the landlord from taking any action that would interfere with or otherwise disturb those facilities.

Finally, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), this Court held that had the government "required the [property owners] to make an easement across their beachfront available to the public on a permanent basis . . . , we have no doubt there would have been a taking." The Court reached this conclusion *even though* that property would have been periodically occupied not by the government, but by random members of the beachgoing public:

> In *Loretto* we observed that where governmental action results in "a permanent physical occupation" of the property, by the government itself *or by others*, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

Id. at 831-32 (emphasis added and citations omitted) (quoting *Loretto*, 458 U.S. at 432-35). *Nollan* therefore confirms that physical occupations may be effected "by the government itself *or by others*." As in *Kaiser Aetna*, the occupiers could not be said to be "under government authority" any more than anyone so acts when he independently visits a place he is authorized to be. Furthermore, having merely required that a lateral ease-

ment be made "available" to the public, the government in no way caused or induced (or "forced") the public to traverse the property owners' beachfront, nor did it exert any "control" over when and where those traversals occurred. Thus, *Nollan* also confirms that the concepts of authority, causation, inducement, control, and force on which the Federal Circuit based its decision are in fact not prerequisites to government's liability for categorical takings by physical occupation.[3]

In focusing on those concepts, the Federal Circuit missed the common thread in this Court's physical takings jurisprudence, namely, the concept of required acquiescence or (to say the same thing) the loss of the right to exclude. When government regulation imposes that loss by making formerly private property "available" for use by third parties, it effects a taking by physical occupation. Having acknowledged that, as a result of government action, petitioner "lost whatever right it had to 'exclude' the owls nesting on its land, 296 F.3d at 1354, the court should have found a physical taking. Its failure to do so put it conflict with this Court.

C. The Conflict with Other Lower Courts

In the past decade, a variety of statutory and regulatory schemes have required the lower courts to apply this Court's physical takings jurisprudence. Several of the resulting decisions are in conflict with the decision below.

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[3] *Nollan* also demolishes the Federal Circuit's apparent holding that only "permanent and exclusive" (as opposed to intermittent or non-exclusive) occupations qualify as categorical takings: "We think a 'permanent physical occupation' has occurred, for purposes of [such term], where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." 483 U.S. at 832. There is no suggestion in *Nollan*, moreover, that the Nollans themselves were excluded from the beach, that they were "absolutely dispossess[ed]" by the relevant regulation. 296 F.3d at 1353.

We turn first to the "mandatory access provision" of the federal Pole Attachment Act. Under that provision, a public utility company "shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it" for the purpose of installing and carrying television or telephone wires. 47 U.S.C. § 224(f)(1). Under implementing regulations issued by the Federal Communications Commission, a cable or telephone company's access to, and use of, a utility's property to install and carry wires is triggered by a *request* from that company.[4] Accordingly, any use of that property by third parties depends on the independent choices of those parties. In other words, just as in *Nollan*, the statute in no way *causes or induces* (let alone *forces*) cable or telephone companies to use the utility's property; rather, the statute "requires that poles, ducts, conduits and rights-of-way controlled by utilities [be] *made available*" to requesting companies.[5]

Notwithstanding the lack of causation or inducement or force on the part of the government, and notwithstanding that cable and telephone companies are not under the government's control, the Eleventh Circuit had little trouble concluding that

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[4] *See* 47 C.F.R. § 1.1403(b) ("*Requests for access* to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing." (emphasis added)); 61 Fed. Reg. 45,476, 45,588 (1996) (observing that the statute "reflects Congress' determination that utilities generally must accommodate *requests for access* by telecommunications carriers and cable operators" (emphasis added)); *id.* at 45,593 ("Section 224(f)(1) mandates that a utility grant access to a *requesting* telecommunications provider or cable system operator . . . ." (emphasis added)).

[5] H.R. Conf. Rep. No. 104-458, *reprinted in* 142 Cong. Rec. H1078, H1133 (Jan. 31, 1996) (emphasis added) (discussing "Section 204 of the Senate bill"); *cf. id.* at H1134 (observing that as to Section 204, "[t]he conference agreement adopts the Senate provision with modifications").

"the Act's mandatory access provision effects a [physical] taking of a utility's property." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (citation omitted). The court readily recognized that, like Boise Cascade vis-à-vis the spotted owls, a utility "has no choice but to permit a cable [or telephone company] to permanently occupy physical space" on or in its property. *Id.* In contrast to the Federal Circuit, the Eleventh Circuit correctly perceived that "[s]uch a permanent, physical occupation of property falls squarely within the *Loretto* rule." *Id.* at 1329.

The conflict is even more explicit, however. Recall that the court below ruled that requiring property owners to acquiesce in the presence of spotted owls did not effect a physical occupation because the government "*simply regulated* [Boise's] use of the property based on the presence of the spotted owls there." 296 F.3d at 1354 (emphasis added) (quoting *Board of Forestry*, 991 P.2d at 570). The Eleventh Circuit confronted a similar argument in *Gulf Power*—"the mandatory access provision [is] a *simple regulatory* condition"—and quickly rejected the same as "meritless." 187 F.3d at 1330 (emphasis added). "Characterizing the mandatory access provision as a regulatory condition," concluded the court, "cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Id.* at 1331.

More generally, the "power to regulate [property] does not extend to taking without just compensation the right of a [property owner] to exclude unwanted occupiers of its property." *Id.* As the Eleventh Circuit observed, among other arguments this Court rejected in *Loretto* "was the argument that the statute was merely a 'permissible regulation of the use of real property.' . . . [A]lthough property is subject to broad regulatory power, a regulation becomes a taking when the government authorizes permanent physical occupation by a third party." *Id.* at 1328 (citation omitted) (quoting *Loretto*, 458 U.S. at 439).

We turn next to another "access" scheme, this one called "physical co-location," under which local telephone exchange companies (LECs) are required "to set aside a portion of their central offices for occupation and use by competitive access providers" (CAPs). *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1443 (D.C. Cir. 1994). "In physical co-location," according to the D.C. Circuit, "the CAP strings its cable to the LEC central office"; the LEC "must then turn over space within the central office in which the CAP may install and operate its circuit terminating equipment." *Id.* at 1444. The *Bell Atlantic* litigation involved a challenge to an FCC order that generally "require[d] LECs to permit CAPs to connect their facilities to the LEC network through" physical co-location. *Id.* In sustaining this challenge, the D.C. Circuit concluded that the order "directly implicates the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.'" *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426). Why is that so? Because the order would result in "an identifiable class of cases in which application of [the order] will necessarily constitute a taking." *Id.* (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)).[6]

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[6] *Accord GTE Service Corp. v. FCC*, 205 F.3d 416, 421 (D.C. Cir. 2000) (vacating a subsequent FCC co-location order in part because it "may result in unnecessary [physical] takings of LEC property"); *GTE Southwest Inc. v. Public Utility Commission*, 10 S.W.3d 7, 11 (Tex. App. 1999) (ruling that "the Commission's order amounts to a physical or per se taking of GTE's cables and facilities by requiring that GTE surrender its right to exclude others from physical use of its properties"); *id.* at 13 (explicitly "disagree[ing]" with the contention that "the Commission's order amounts not to a taking in the *Loretto* sense, but only to permissible regulation"); *GTE Northwest Inc. v. Public Utility Commission*, 900 P.2d 495 (Or. 1995) (invalidating state-law physical co-location scheme as a physical taking), *cert. denied*, 517 U.S. 1155 (1996).

Like the Eleventh Circuit's decision in *Gulf Power*, the D.C. Circuit's decision in *Bell Atlantic* cannot be squared with the ruling below. Although the challenged FCC order was said to "require" physical co-location, *Bell Atlantic*, 24 F.3d at 1443, that was merely shorthand for saying that physical co-location was required *if, and only if, it was requested by the CAP*. *See id.* at 1444 (framing issue as whether "the Commission lacks authority . . . to require LECs to permit physical co-location of equipment *upon demand*" (emphasis added)). In other words, perhaps to labor the point, the order found to effect a physical taking in *Bell Atlantic* surely did not *cause or induce* (or *force*) the CAP to occupy LEC property, and the order did not put the government in control of which property would be occupied. Accordingly, the decisions of the Eleventh and D.C. Circuits have no regard for the concepts of authority, causation, inducement, control, and force on which the Federal Circuit rested its decision. The result is a straightforward conflict among lower courts in the interpretation of federal takings law.[7]

In all of these cases it could reasonably be asserted, as the court asserted below, that the government "simply regulated [owners'] use of the property based on the presence of" the occupying instrumentalities. 296 F.3d at 1354 (quoting *Board of*

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[7] In the reported decisions discussed herein, the range of things that can effect takings by physical occupation runs from humans (*Kaiser Aetna* and *Nollan*) all the way to inanimate objects (*Loretto*, *Gulf Power*, and *Bell Atlantic*). Moreover, one can easily imagine takings by physical occupation where domestic animals are involved; e.g., the government requires *A* to open his pastureland to grazing by *B*'s cattle. Given this spectrum, there is no reason why "wild" animals such as spotted owls should be categorically excluded from physical occupation analysis. Certainly, it cannot be because the government does not "control" wild animals, as the Federal Circuit concluded. *See* 296 F.3d at 1354. As this Court's decisions demonstrate, what counts is not control by the government but "required acquiescence" on the part of the property owner. *Yee*, 503 U.S. at 527.

Forestry, 991 P.2d at 570). That is, whenever the boaters, cable equipment, telephone equipment, or beachgoers were "present" on the property, the owners were restricted in their "use" of it. But the restrictions were of a particular kind: the owners could not use their property in ways that would interfere with the occupiers' government-sanctioned use. That is precisely the kind of "regulation" Boise Cascade endured based on the presence of spotted owls—restrictions on using their forestland in ways that would interfere with owls' present and future use of that same land as habitat. That is, Boise's use of its property was not regulated in the abstract; it was regulated for the purpose of—and with the actual effect of—requiring Boise to acquiesce in the owls' presence and, concomitantly, preventing it from excluding the owls. The *whole point* of the ESA regulations imposed by the government and enforced at its behest by the Oregon district court was to ensure that Boise's property "will be *used* again . . . for nesting by either the Walker Creek male or another owl pair." Petition Appendix 30a (emphasis added) (government's ESA counterclaim against Boise).

If the government could be liable for a taking by physical occupation in *Kaiser Aetna*, *Loretto*, or *Nollan* without having caused or induced or forced the third-party occupations, and without having exercised control over the occupiers, the government can be (and is) liable for such a taking in the present case. If "simply regulating" private property based on the presence of government-sanctioned third-party occupiers could effect a physical taking in *Kaiser Aetna*, *Loretto*, or *Nollan*, it can (and did) effect such a taking here.

In so arguing, we do not mean to suggest that a physical taking occurs merely by enactment of a statute or a regulation or by other government action that *theoretically* extinguishes a property owner's right to exclude. In a trivial sense, every owner in the country "lost" the right to exclude spotted owls when that species was listed under the ESA. But for purposes of the Takings Clause, we think the crucial point is when that

loss becomes more than theoretical, i.e., when it begins to have real-world effects. Thus, petitioner did not suffer a physical taking when the ESA was enacted, when the habitat modification regulation (50 C.F.R. § 17.3) was promulgated, or even (it would seem) when the spotted owl was listed. While one can imagine varying scenarios, in the present case it is reasonably clear that Boise Cascade lost its right to exclude in a practical sense when the Oregon district court entered "a preliminary injunction preventing logging pending the results of the [Forest] Service's 1998 breeding season surveys." 296 F.3d at 1342.

The limitations on what might be called occupations-by-regulation are apparent in the cases discussed above. Thus, in *Kaiser Aetna*, an actual taking would have occurred only if and when the government obtained the requested "injunction to require [the owners] to allow public access" to the waters of the marina on the ground that it had become subject to the federal "navigational servitude," 444 U.S. at 169, notwithstanding that purported basis for such an injunction, 33 U.S.C. § 403, was enacted in 1899. Until an injunction was entered, the servitude (and the public's use of it) would be wholly theoretical. *See also Nollan*, 483 U.S. at 831 (no physical taking would have occurred until the government actually "required the Nollans to make an easement across their beachfront available to the public on a permanent basis").

Hendler v. United States, 11 Cl. Ct. 91, 93 (1986), *rev'd*, 952 F.2d 1364 (Fed Cir. 1991), provides yet another example. A federal statute gave the government authority to undertake "investigations, monitoring, surveys, testing, and other information gathering" on private property, 42 U.S.C. § 9604(b)(1), and the government had issued an order granting itself access to certain property for the purpose of "locating[,] constructing, operating, maintaining, and repairing [groundwater] wells," 11 Cl. Ct. at 93. Nevertheless, it was not the statute, or even the property-specific administrative order, that effected a physical taking in *Hendler*; rather, it was "the Government's *actions*, in

placing wells on plaintiffs' property and engaging in other activities on the site" that resulted in a physical taking. 952 F.2d at 1375 (emphasis added); *see also Hendler v. United States*, 175 F.3d 1374, 1383 (Fed. Cir. 1999) (rejecting the theory that "the scope of the taking . . . is defined by the broad scope of the access order, and not by the actual activities undertaken by the Government"). By the way, *Hendler* also demonstrates that the finding of a physical taking need not result in serious financial consequences to the government. Even though the taking continued for more than a decade, the Federal Circuit affirmed a judgment that the property owner was due no compensation at all, given that the benefits of the government's activities were found to have outweighed the harms. *See id.* at 1378.

CONCLUSION

In rejecting petitioner's physical takings claim, the Court of Appeals for the Federal Circuit departed from this Court's takings jurisprudence, thereby exacerbating a conflict among the lower courts. The Court should grant the petition for certiorari to resolve that conflict.

DATED: February, 2003.

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No. 02-862

IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a DELAWARE CORPORATION,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Brief for the United States in Opposition ("Response") erroneously attempts to characterize Petitioner's takings claim as a regulatory one, rather than a *per se* physical taking. This argument is based on two faulty premises.

First, the government contends there was no physical occupation of Petitioner's property for takings purposes because it has no control over northern spotted owls. Prior precedent does not focus upon control of the occupant, however, but instead upon government authorization of the occupation as the determining factor. Here, there can be no dispute that spotted owls were authorized to, and did in fact, occupy the subject timberland. Furthermore, federal agents

were authorized to enter Petitioner's property to search for spotted owls and facilitate their continued authorized occupation.

Second, the government asserts that a physical takings analysis does not apply because the authorized occupation of Petitioner's land was not "permanent." To the contrary, the owls were authorized to occupy Petitioner's property for as long as they wished to remain, and Petitioner was barred from excluding the owls until they decided to leave. The injunction entered by the district court banning logging to protect the timberland as a northern spotted owl habitat was a "permanent" one. This was a "permanent physical occupation" under this Court's decision in *Loretto* and its historical physical takings jurisprudence.

Because it fails to acknowledge that Petitioner asserts a viable physical takings claim, the government misplaces reliance upon regulatory takings cases. These decisions are inapposite because, unlike here, they involve land use restrictions in permitting processes where no government-authorized occupation is at issue. Lower courts need guidance on the applicable takings analysis where government imposes a wildlife servitude upon private land. The Petition should be granted.

A. There Was a Government-Authorized Physical Occupation of Petitioner's Property

The Response attempts to portray the injunction that banned logging on Petitioner's property as a temporary means of enforcing *land use* regulations prescribed by the Endangered Species Act of 1973, 16 U.S.C.A. 1531 *et seq.* ("ESA"), and the ESA's incidental take permit ("ITP") application process. (Response at 13.) According to the government, northern spotted owls are simply "natural resources" that migrated onto Petitioner's property, and the injunction resulted in no government-authorized occupation

because it has no control over such "wildlife." (Response at 13.) As result, the Response applies a regulatory takings analysis to Petitioner's claim. (*See* Response at 11-12, discussing the alleged applicability of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419 (1985), a regulatory takings case.)

First, whether owls are "natural resources" is irrelevant, since this Court has held that government-authorized occupation of private land by natural resources can constitute a taking. *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181, 20 L.Ed. 557 (1871) ("[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.").

Second, the fact that spotted owls are "wild" and beyond government control is also irrelevant to Petitioner's physical takings claim. Government had no control over the movement of the boating public in *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979), and the State of New York had no control over the "migration" of the cable television company in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982). The test is not control of the occupant, but whether government requires the landowner to acquiesce to an occupation by a third-party, live or inanimate. *Yee v. Escondido*, 503 U.S. 519, 527, 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992); *Kaiser Aetna*, 444 U.S. at 176; *Loretto*, 458 U.S. at 439. The Response ignores this crucial distinction.

The government contends that the intrusion upon Petitioner's land by federal agents was merely incidental to the land use restrictions imposed for purposes of processing Petitioner's ITP application. That argument would be relevant only in a regulatory taking context. Here, the federal

agents occupied Petitioner's land as part of, and for purposes of perpetuating, a wildlife servitude that was imposed on Petitioner's property by the injunction. Where government agents performing official duties take part in a physical occupation of private land there is a physical taking. *See Malone v. Bowdoin*, 369 U.S. 643, 82 S. Ct. 980, 8 L.Ed.2d 168 (1962) (compensation could be sought in lower court for physical taking due to forest ranger's occupation of private land); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 & n. 18, 69 S. Ct. 1457, 93 L.Ed. 1628 (1949) (similar holding).

B. There Was a "Permanent" Government-Authorized Occupation of Petitioner's Timberland

1. The Government Misconstrues the Meaning of a "Permanent" Physical Occupation

The government argues that there was no "permanent physical occupation" of the subject timberland sufficient to constitute a taking because the injunction was eventually lifted and Petitioner was allowed to harvest its timber. (Response at 10-11.) Contrary to the government's suggestion, however, a "permanent physical occupation" is not defined in *Loretto* as one of infinite duration. The applicable test is whether there has been a government-authorized physical occupation for a public purpose, coupled with a deprivation of the landowner's right to exclude the occupant *for as long as the intruder wishes to remain*. *See Yee v. Escondido*, 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176.

As this Court explained in *Loretto*:

"Insofar as Teleprompter means to suggest that this is not a *permanent* physical invasion, we must differ. So long as the property remains residential and a CATV company *wishes to retain the installation*, the landlord must permit it." 458 U.S.

at 439 (emphasis added). Thus, the wires and boxes affixed to the building in *Loretto* constituted a "permanent" occupation regardless of whether they remained there for a day, a year, or infinitely. It is ancient law that "'[a]ny invasion of property'" is a taking "'either upon, above or below the surface, and whether *temporary* or permanent.'" *Id.* at 430 n. 7 (emphasis added) (citing 1 W. Blackstone, Commentaries 139 and quoting J. Lewis, *Law of Eminent Domain in the United States* 197 (1888)).

Loretto contains an in-depth analysis of prior precedent supporting Petitioner's interpretation of what constitutes a "permanent" physical occupation. For example, in *Kaiser Aetna* the imposition of a navigational servitude requiring public access to a pond was held to be a taking. *See Loretto*, 458 U.S. at 433. The taking was "permanent" regardless of how often the boating public chose to use the right of way through the private property. The key was not duration *per se*, but the imposition of a servitude for occupation by third parties as often as they liked, in derogation of the landowner's right to exclude, "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* (quoting *Kaiser Aetna*, 444 U.S. at 176).

Loretto also examines *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L.Ed. 1206 (1946), where it was held that frequent overflights of government planes at low altitudes can result in a permanent physical taking because they devalue private property and a landowner has no power to exclude them. *Loretto*, 458 U.S. at 430-431. The government may choose to cease such flights at any time, but the occupation is just as "permanent" for a physical takings analysis.

Further instructive is this Court's discussion in *Loretto*, contrasting prior decisions that have found physical takings with those that have not. *See* 458 U.S. at 430-434.

For example, in *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670, 95 L.Ed. 809 (1951), the government's five-month seizure and direction of the operations of a private coal mine to prevent a national strike by miners constituted a physical taking. The limited duration of the physical occupation made no difference. In *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330, 43 S. Ct. 135, 67 L.Ed. 287 (1922), the government's intent to fire munitions over a private resort was held to be a physical taking if the plaintiff could prove the government was in fact engaging in such activity. The decision placed no importance on any showing that such military exercises would be infinite in duration. *Id.* at 330. *See Loretto*, 458 U.S. at 430-431 (discussing *Pewee* and *Portsmouth*).

By contrast, in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 78 S. Ct. 1097, 2 L.Ed.2d 1228 (1958), no taking occurred where a government order required certain gold mines to cease operations to conserve resources for the war effort. A physical takings analysis did not apply there because the "'the Government *did not occupy, use, or in any manner take physical possession* of the gold mines or of the equipment connected with them.'" *Loretto*, 458 U.S. at 431-432 (emphasis added) (quoting *Central Eureka Mining Co.*, 357 U.S. at 165-166).

Loretto also distinguished *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980). In that case, this Court upheld a state constitutional requirement that shopping centers permit exercise of free speech rights on their property. 447 U.S. at 84. Relevant factors to this holding were: (1) that the general public is already invited to occupy the land, and (2) that the owner has sufficient *power to exclude* through reasonable time, place, and manner restrictions on expression that will minimize interference with commercial functions of the property. *Id.* *See Loretto*, 458 U.S. at 434 (discussing *PruneYard*).

Numerous other decisions of this Court also support the proposition that temporary, government-authorized physical occupations are compensable takings. As this Court recently explained in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1478-79, 152 L.Ed.2d (2002):

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, [*Pewee*], regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government *occupies the property* for its own purposes, *even though that use is temporary.*

(Emphasis added.) *See also First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987) (forced temporary occupation by floodwater).

2. The Ability to Make Some Commercial Use Is Irrelevant to Physical Takings Claims

The government argues that there was no permanent physical occupation here because Petitioner allegedly was permitted some use of its property. This contention has no merit. The ability to derive *some* commercial use or value is relevant only in the regulatory takings context, *see, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992). As this Court explained in *Loretto*:

> "It is true that the landlord could avoid the requirements of [the law allowing cable television equipment installation] by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."

458 U.S. at 439, n. 17. Here, Petitioner's right to harvest its timber was compromised by the district court's "permanent" injunction, which imposed a servitude to preserve the timberland for occupation by spotted owls.

C. The Government's Attempt to Blur the Line Between Physical and Regulatory Takings Demonstrates Why the Petition Should Be Granted

This Court stated a bright-line test for distinguishing between physical takings and regulatory takings in *Tahoe-Sierra*, 122 S. Ct. 1465. A regulatory taking does not give the government "any right to use the property" for its own purposes, *id.* at 1479 n. 19, a right which the government claimed in this case. Moreover, a regulatory taking does not involve the landowner's right to exclude unwanted occupants (*id.*), which right is also at the heart of this case.

The government attempts to shoehorn this case into the category of land use restrictions incidental to government permit processes, which involve no government-authorized physical occupation. (*See* Response at 11-12.) As demonstrated above, that characterization is simply incorrect. Consequently, the government's contention that Petitioner must prove facts consistent with a regulatory taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978) and *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980), is also incorrect.

The government's strategy, however, is relevant in and of itself. Regulatory takings are notoriously difficult to prove and very fact intensive. The existence of a physical taking, on the other hand, is much easier to establish. *See Loretto*, 458 U.S. at 426. Placing all wildlife servitude claims in a regulatory takings "box" puts the landowner at a disadvantage. As a matter of law, that approach is invalid.

Moreover, as a matter of public policy, where government chooses to forgo the acquisition of private land by eminent domain to protect wildlife, it should be required to pay compensation to landowners who may otherwise be inclined to harvest or develop their property as quickly as possible before a protected species invades and government actions to preserve the land untouched will render the property essentially valueless.[1]

CONCLUSION

Petitioner respectfully urges this Court to grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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[1] The Petition discusses the conflict in lower court decisions on this issue. The Response cites the fact that some of these cases involved takings claims under state constitutional law. That is for practical purposes a distinction of form over substance. The division of opinion on how to approach takings claims where a wildlife servitude is imposed remains an important one that this Court can and should resolve.